THE LAW
OF
DIRECTORS AND OFFICERS
OF
JOINT STOCK COMPANIES.

BY
HENRY HURRELL,
AND
CLARENDON G. HYDE.

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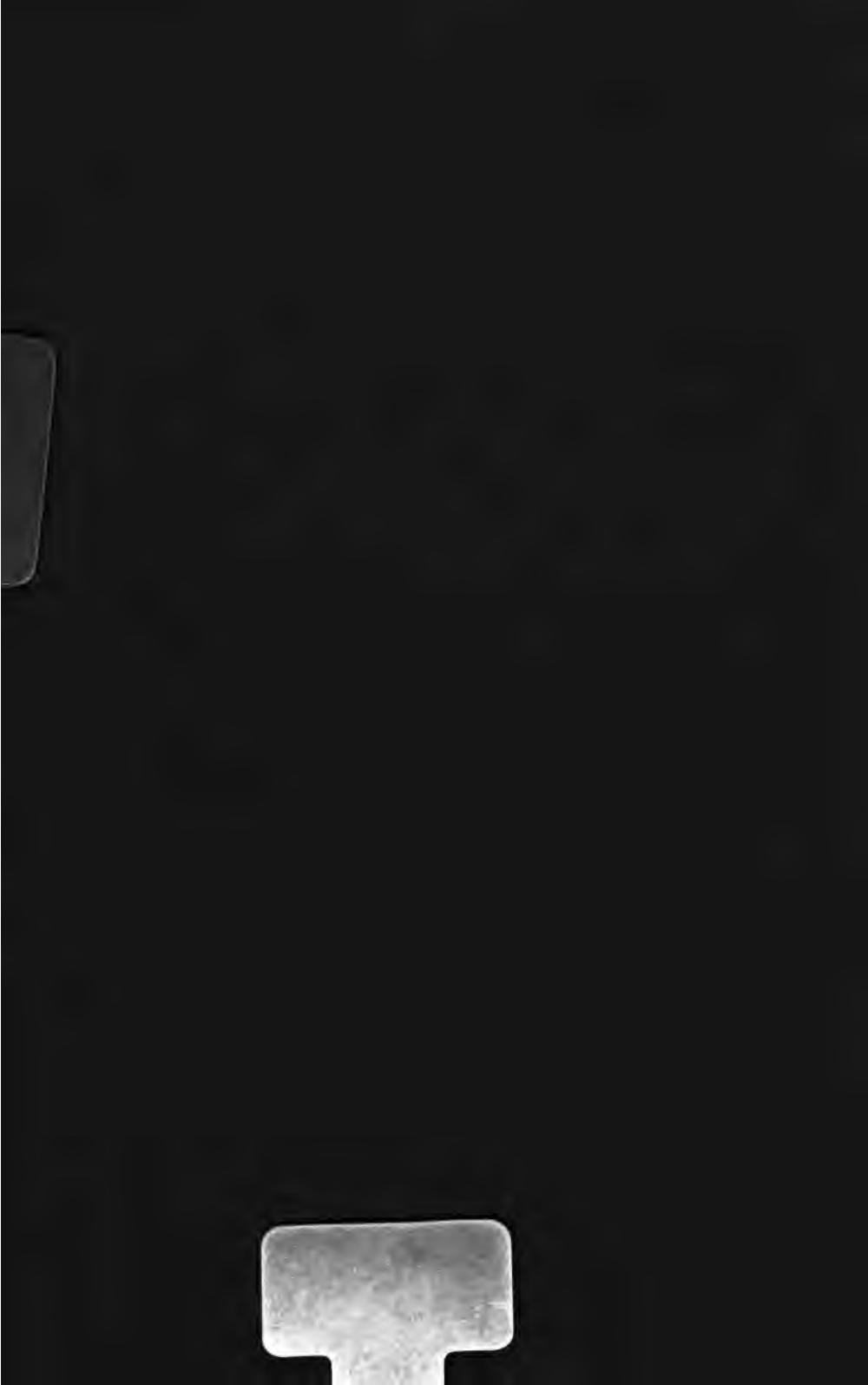

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THEIR POWERS, DUTIES AND LIABILITIES,

BY

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AND

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(AUTHORS OF "A TREATISE ON THE LAW OF JOINT STOCK COMPANIES.")

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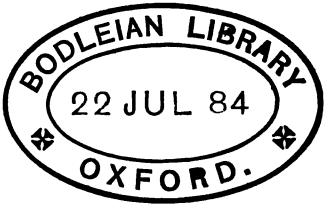

PREFACE.

THE Authors in this book endeavour to point out as clearly and concisely as possible the legal position of Directors, Secretaries, Managers and other officers of Joint Stock Companies formed under the Companies Acts, and to indicate the duties and liabilities which the holding of those offices involves.

The many cases which are brought annually before the Courts tend to show that by very many persons the nature and extent of the powers, duties and liabilities devolving on Directors and other Officers of Companies are greatly misunderstood.

The Authors trust that this attempt to summarise the legal position of Directors and Officers may contribute somewhat to a clearer understanding on the subject.

As many Companies incorporate with their Articles of Association most of the provisions of Table A of the Companies Act, 1862, it has been thought convenient to subjoin that table as an Appendix.

Throughout the text of the book the references to reported cases have been taken, as a matter of convenience, from one source only; but in the Table of Cases will be found references to the other reports.

H. H.
C. G. H.

1, TEMPLE GARDENS, TEMPLE,
May, 1884.

TABLE OF CONTENTS.

CHAPTER I.

DIRECTORS.—Their position—Who may be—Who may not be—Unlimited liability of.

CHAPTER II.

OFFICERS.—Their position—Remedies—Duties—Statutory obligations—Authority—Liabilities—Dismissal.

CHAPTER III.

DIRECTORS.—Their appointment—Removal—Remuneration—Qualification—Eligibility.

CHAPTER IV.

PROMOTERS.—Who are—Their position—First Directors—Adoption of Contracts—Abortive Companies—Provisional Committees—Preliminary Expenses.

CHAPTER V.

PROSPECTUS.—Its office—Misrepresentation—Who are responsible for—Remedies of Shareholders—Innocent mis-statements—Measure of Damages.

CHAPTER VI.

CONTRACTS IN PROSPECTUS.—Effect of non-disclosure—Secret profits—"Knowingly issue"—Sub-contracts—Waiver of notice—Requirements of Stock Exchange.

CHAPTER VII.

SHARES.—Allotment of—Transfer of—Discretionary power—Married women—Calls—Forfeiture—Issue at discount—Dealings in, by Directors.

CHAPTER VIII.

BOARD MEETINGS.—How constituted—Casual vacancies—Quorum—Exclusion of Directors—Knowledge of Directors—Place of Meeting—Minutes—Committees.

CHAPTER IX.

STATUTORY DUTIES.—Name of Company—Register of Mortgages—Share Register—Special Resolutions—Alteration in Capital—Published Balance Sheets—Penalties.

CHAPTER X.

GENERAL MEETINGS.—Notice of—Ordinary—Extraordinary—Resolutions—Amendments—Committee of Investigation—Powers of Majority—Quorum—Poll—Proxies.

CHAPTER XI.

POWERS OF DIRECTORS.—Excess of authority—General scope of—*De facto* Directors—Indemnity—Directors as creditors—Interference of Court.

CHAPTER XII.

LIABILITIES OF DIRECTORS.—Losses by imprudence—Losses by fraud—Misapplication of funds—Profits made out of Company—Actions by Shareholders—*Ultra vires.*

CHAPTER XIII.

MISFEASANCE.—Bribes—Improper dividends—Fraudulent balance sheets—Liability of officers—Payment of promotion money—Claims in winding up—Examination of witnesses.

CHAPTER XIV.

CRIMINAL LIABILITY.—Misapplication of funds—Fraudulent prospectus—False entries—Fraudulent balance sheets—Fictitious dividends.

APPENDIX.

Companies Act, 1862. Table A.

TABLE OF CASES.

PAGES

Aberdeen Railway Coy. *v.* Blaikie, 1 Macq., 471; 2 Eq. R. 1281 30, 65
Accidental Insurance Coy. *v.* Davis, 15 L. T. 182 44
Agar *v.* Athenæum Life Assurance Association, 3 C. B. N. S. 725; 27 L. J. C. P. 95 94
Albion Steel Coy. *v.* Martin, 1 Ch. D. 580; 45 L. J. Ch. 173; 33 L. T. 660; 24 W. R. 134 89
Alexandra Palace Coy., 21 Ch. D. 149; 51 L. J. Ch. 655; 46 L.T. 730; 30 W. R. 771 . . . . . 106, 110
Alma Spinning Coy., 16 Ch. D. 681; 50 L. J. Ch. 170; 43 L. T. 620; 29 W. R. 133 . . . . . 56, 57, 62
Ambrose Lake Tin Coy., 14 Ch. D. 390; 49 L. J. Ch. 457; 42 L. T. 604; 28 W. R. 783 90
Anglo-Universal Bank *v.* Baragnon, 45 L. T. 362 56
Arkwright *v.* Newbold, 17 Ch. D. 301; 50 L. J. Ch. 372; 44 L. T. 393; 29 W. R. 455 . . . . . 37, 43, 49
Ashbury Railway Carriage Coy. *v.* Riche, 7 H. L. 653; 44 L. J. Ex. 185; 33 L. T. 451 96
Ashhurst *v.* Fowler, 20 Eq. 225 108
Ashhurst *v.* Mason, 20 Eq. 225; 44 L. J. Ch. 337; 23 W. R. 506 63
Atwool *v.* Merryweather, 5 Eq. 464 n.; 37 L. J. Ch. 35. . . 77
Austin's Case, 24 L. T. 932 64

Bagnall *v.* Carlton, 6 Ch. D. 371; 47 L. J. Ch. 30; 37 L. T. 481; 26 W. R. 243 . . . . . 25, 47
Barber's Case, 5 Ch. D. 963; 26 W. R. 3 16
Barnes *v.* Addy, 9 Ch. 244; 43 L. J. Ch. 513; 30 L. T. 4; 22 W. R. 505 109
Barwick *v.* English Joint Stock Bank, 2 Ex. 259; 36 L. J. Ex. 147 9, 93
Beattie *v.* Lord Ebury, 7 H. L. 102; 44 L. J. Ch. 20; 30 L. T. 581; 22 W. R. 897 . . . . . 91, 195
Belfast Railway *v.* Belfast and Holywood Railway, L. R. (Ir.) 8 Eq. 581 n. 19
Bird *v.* Randall, 3 Burr 1,345; 1 W. Bl. 373, 387 7
Bishop's Case, 7 Ch. 296 n. 55

Boast *v.* Firth, 4 C. P. 1; 38 L. J. C. P. 1; 19 L. T. 264; 17 W. R. 29 7
Brett and Hewett's Case, 25 Ch. D. 283; 49 L. T. 479; 32 W. R. 234 21
Bridport Brewery Coy. 2 Ch. 191 78
Briggs, *ex pte.*, 1 Eq. 483; 35 L. J. Ch. 320; 14 L. T. 39; 12 Jurist (N. S.) 322 44
Bright *v.* Hutton 3 H. L. C. 341; 16 Jur. 695 31
British Guardian Life Assurance, 14 Ch. D. 335; 49 L. J. Ch. 446; 28 W. R. 945 103
British Seamless Paper Box Coy., 17 Ch. D. 467; 50 L. J. Ch. 497; 44 L. T. 498; 29 W. R. 690 90
Brownlie *v.* Campbell, 5 App. Cas. 925 40
Brown's Case, 9 Ch. 102; 43 L. J. Ch. 153; 29 L. T. 562; 22 W. R. 171 . . . . . 24, 102
Buckingham *v.* Surrey and Hants Canal, 46 L. T. 885; 46 J. P. 774 11
Burnes *v.* Pennell, 2 H. L. C. 479; 13 Jur. 897 120

Caledonian Security Coy. *v.* Curror, 9 C. of S. Cas. 1115 (Sc.). . 88
Cambrian Mining Coy., 20 Ch. D. 376; 51 L. J. Ch. 221; 30 W. R. 283 113
Campbell's Case, 4 Ch. D. 470; 35 L. T. 900; 25 W. R. 299 . 82
Cannon *v.* Trask, 20 Eq. 669; 44 L. J. Ch. 772 . . . 56, 82
Cape Breton Coy., 1884, W. N. 54 90
Capper's Case, 8 Ch. 458; 16 W. R. 1,002 55
Cargill *v.* Bower, 10 Ch. D. 502; 45 L. J. Ch. 649; 38 L. T. 779; 26 W. R. 716 . . . . . 36, 88
Carling's Case, 1 Ch. D. 115; 45 L. J. Ch. 5; 33 L. T. 645; 24 W. R. 165 . . . . . 101, 102
Carmichael's Case, 46 L. T. 653; 30 W. R. 742 . . . 16, 22
Cartmell's Case, 9 Ch. 691; 43 L. J. Ch. 588; 31 L. T. 52; 22 W. R. 697 . . . . . 8, 61, 63
Central Railway of Venezuela *v.* Kisch, 2 H. L. 99; 36 L. J. Ch. 849; 16 L. T. 500; 15 W. R. 821 . . . . . 35, 39, 44
Chapleo *v.* Brunswick Building Society, 6 Q. B. D. 696; 50 L. J. Q. B. 372; 44 L. T. 449; 29 W. R. 529 96
Chapman's Case, 1 Eq. 346 11
Cherry *v.* Colonial Bank of Australasia, 3 P. C. 24; 6 Moore P. C., N. S. 235 95
Chesterfield Colliery Coy. *v.* Black, 37 L. T. 740; 26 W. R. 207 . 90
City of Glasgow Bank *v.* Mackinnon, 9 C. of S. Cas. 535 . . 106
Clark, *ex parte* 7 Eq. 550; 38 L. J. Ch. 562; 20 L. T. 774 . . 12
Collen *v.* Wright, 26 L. J. Q. B. 147; 7 El. and Bl. 301; 3 Jur. 363 95

Collie's Claim, 12 Eq. 246 ; 40 L. J. Ch. 567 ; 25 L. T. 526 ; 19 W. R. 1,022 65
Colonial Bank *v.* Willan, 5 P. C. 417 ; 43 L. J. P. C. 39 ; 30 L. T. 237 ; 22 W. R. 516 93
Cornell *v.* Hay, 8 C. P. 328 ; 42 L. J. C. P. 136 ; 28 L. T. 475 ; 21 W. R. 580 45
Cotes *v.* Sadler, 2 Keb. 16 7
County Life Assurance, 5 Ch. 288 ; 39 L. J. Ch. 471 ; 22 L. T. 537 ; 18 W. R. 390 . . . . . 83, 98
Credit Coy., 11 Ch. D. 256 ; 48 L. J. Ch. 221 ; 27 W. R. 380 . 68
Credit Foncier, *ex pte.*, 7 Ch. 161 ; 41 L. J. Ch. 345 ; 25 L. T. 858 ; 20 W. R. 254 64
Creen *v.* Wright, 1 C. P. D. 591 ; 35 L. T. 339 11
Cullen *v.* Thomson, 6 L. T. 870 ; 4 Macq. 441 ; 9 Jur. 85 . 6, 107
Curtis' Case, 6 Eq. 455 ; 37 L. J. Ch. 629 55

D'Arcy *v.* Tamar, &c., Coy., 2 Ex. 158 ; 36 L. J. Ex. 37 ; 4 H. & C. 463 64
Davidson *v.* Tulloch, 3 Macq. 783 ; 6 Jur. 543 ; 8 W. R. 309 . . 43
Dean and Gilbert's Case, 41 L. J. Ch. 476 ; 26 L. T. 467 . . 14
De La Mott's Case, 31 L. T. 773 ; 23 W. R. 405 77
Denham and Coy., 25 Ch. D. 752 ; 32 W. R. 487 106
Denton *v.* Macneill, 2 Eq. 352 35
De Ruvigne's Case, 5 Ch. D. 306 ; 46 L. J. Ch. 360 ; 36 L. T. 329 ; 25 W. R. 476 . . . . . 23, 82
Downes *v.* Ship, 3 H. L. 343 ; 37 L. J. Ch. 642 44
Dronfield Coal Coy., 17 Ch. D. 76 ; 50 L. J. Ch. 387 ; 44 L. T. 361 ; 29 W. R. 768 81
Dunston *v.* Imperial Gas Light Coy., 2 B. and Ad. 125 . . 18

Eagle Coy., *ex pte.*, 4 K. and J. 549 ; 27 L. J. Ch. 829 . . 94
Eaglesfield *v.* Marquis of Londonderry, 4 Ch. D. 693 ; 35 L. T. 882 ; 25 W. R. 190 (C. A.) ; 38 L. T. 303 ; 26 W. R. 540 (H. L.) 97
Eales *v.* Cumberland Black Lead Coy., 30 L. J. Ex. 141 ; 3 L. T. 861 ; 7 Jur. 169 ; 6 H. and N. 481 16
Ebbw Vale Coy. Claim, 8 Eq. 14 64
Eley *v.* Positive Life, 1 Ex. D. 88 ; 45 L. J. Ex. 451 ; 34 L. T. 190 ; 24 W. R. 338 . . . . . 6, 15, 16
Emma Mining Coy. *v.* Grant, 17 Ch. D. 122 ; 50 L. J. Ch. 449 ; 29 W. R. 481 . . . . . 47, 110

Emma Mining Coy. *v.* Lewis, 4 C. P. D. 396; 48 L. J. C. P. 257; 40 L. T. 168; 27 W. R. 836 46
Empress Engineering Coy., 16 Ch. D. 125; 43 L. T. 742; 29 W. R. 342 25
Englefield Colliery Coy., 8 Ch. D. 388; 38 L. T. 112 . . . 107
English Joint Stock Bank, *in re*, Harding *ex parte*, 3 Eq. 341; 15 L. T. 528 12
English Joint Stock Bank, *in re*, 3 Eq. 203 112
Erlanger *v.* New Sombrero Phosphate Coy., 3 App. Cas. 1218; 48 L. J. Ch. 73; 39 L. T. 269; 27 W. R. 65 . . . 26, 47
Etna Insurance Coy., L. R. 7, Eq. 235, 424, (Ir.) 91
European Bank, *in re*, 5 Ch. 358; 39 L. J. Ch. 588; 22 L. T. 422; 18 W. R. 474 64
Evans *v.* Coventry, 25 L. J. Ch. 489; 26 L. J. Ch. 400; 8 De G. M. & G. 835; 3 Jur. 1225 106

Featherstone *v.* Cooke, 16 Eq. 298 85
Ferguson *v.* Wilson, 2 Ch. 77; 36 L. J. Ch. 67 91
Fitzroy Steel Coy., 50 L. T. 144 . . . . 29, 64, 103, 110
Flitcroft's Case, 21 Ch. D. 519; 52 L. J. Ch. 217; 48 L. T. 86; 31 W. R. 174. . . . . 100, 105, 110
Forbes' Case, 8 Ch. 768; 28 L. T. 888 23
Forest of Dean Coal Coy., 10 Ch. D. 450; 40 L.T. 287; 27 W. R. 594 108
Foss *v.* Harbottle, 2 Hare 461 85
Foxall *v.* International Land Credit Coy., 16 L. T. 637 . . . 11

Garden Gully Coy. *v.* McLister, 1 App. Cas. 39; 33 L. T. 408; 24 W. R., 744 . . . . . 56, 57, 62
Gaslight Improvement Coy. *v.* Terrell, 10 Eq. 168; 39 L. J. Ch. 725; 23 L. T. 386 . . . . . 20, 84
General Exchange Bank *v.* Horner, 9 Eq., 480; 39 L. J. Ch. 393; 22 L. T. 693; 18 W. R. 414 18
Gerhard *v.* Bates, 22 L. J. Q. B. 365; 17 Jur. 1097; 2 El. and Bl. 476 42
Gibson *v.* Barton, 10 Q. B. 329; 44 L. J. M. C. 81; 32 L. T. 396; 23 W. R. 858 72
Gilbert's Case, 5 Ch. 559; 39 L. J. Ch. 837; 23 L. T. 341; 18 W. R. 938. . . . . 60, 82
Gold Coy., 11 Ch. D. 701; 48 L. J. Ch. 281, 650; 40 L. T. 5; 27 W.R. 341, 757 58

Gover's Case, 1 Ch. D. 182; 45 L. J. Ch. 83; 33 L. T. 619; 24 W. R. 125 . . . . . 45, 48
Great Wheal Polgooth, 53 L. J. Ch. 42; 49 L. T. 20; 32 W. R. 107 8
Green's Case, 18 Eq. 428; 43 L. J. Ch. 629; 30 L. T. 672; 22 W. R. 791 22
Gunn's Case, 3 Ch. 40; 37 L. J. Ch. 40; 17 L. T. 365; 16 W. R. 97 52

Hallmark's Case, 9 Ch. D. 329; 47 L. J. Ch. 868; 38 L. T. 660; 26 W R. 824 63
Hambley *v.* Trott, Cowp. 375 36
Hamilton's Case, 8 Ch. 548; 42 L. J. Ch. 465; 28 L. T. 652; 21 W. R. 518 . . . . . 24, 72
Hamley's Case, 5 Ch. D. 705; 46 L. J. Ch. 543; 37 L. T. 349; 25 W. R. 600 . . . . . 16, 22
Hampshire Milk Coy., 29 W. R. 170 24
Hampson *v.* Price's Patent Candle Coy., 45 L. J. Ch. 437; 34 L. T. 711; 24 W. R. 754 83
Harben *v.* Phillips, 23 Ch. D. 14; 48 L. T. 334, 741; 31 W. R. 173 . . . . . 17, 63, 79
Harding, *ex parte*, 3 Eq. 341; 15 L. T. 528 12
Hartland *v.* General Exchange Bank, 14 L. T. 863 12
Harward's Case, 13 Eq. 30; 41 L. J. Ch. 283; 25 L. T. 690; 20 W. R. 84 22
Hattersley *v.* Earl Shelburne, 31 L. J. Ch. 873 85
Hay's Case, 10 Ch. 593; 44 L. J. Ch. 721; 33 L. T. 466 . 101, 102
Henderson *v.* Lacon, 5 Eq. 249; 17 L. T. 527; 16 W. R. 328 . 38
Heyman *v.* European Railway, 7 Eq. 154 44
Hooke *v.* Piper, 14 Eq. 278; 41 L. J. Ch. 585; 20 W. R. 700 . 61
Hopcroft *v.* Parker, 16 L. T. 561; 15 W. R. 842 32
Houldsworth *v.* City of Glasgow Bank, 5 App. Cas. 317; 42 L. T. 194; 28 W. R. 677 93
Howard's Case, 1 Ch. 561 . . . . . 8, 52, 61, 64
Hutton *v.* West Cork Railway, 23 Ch. D. 654; 52 L. J. Ch. 377, 689; 48 L. T. 626; 49 L. T. 420; 31 W. R. 542, 827 . . 20

Imperial Hotel Co. *v.* Hampson, 23 Ch. D. 1; 49 L. T. 150; 31 W. R. 330. . . . . 2, 18, 75
Imperial Mercantile Association *v.* Coleman, 6 Ch. 568; 6 H. L. 189; 42 L. J. Ch. 644; 29 L. T. 1; 21 W. R. 696 . . . 16, 90
Ince Hall Rolling Mills Coy., 23 Ch. D. 545 n.; 30 W. R. 945 . . 58

Inderwick *v.* Snell, 2 Mac and G. 216; 19 L. J. Ch. 542; 14 Jur. 727 . . . . . 18, 82
Irvine *v.* Union Bank of Australia, 2 App. Cas. 366; 46 L. J. P. C. 87; 37 L. T. 176; 25 W. R. 682 . . . . . 81, 96
Isle of Wight Ry. *v.* Tahourdin, 25 Ch. D. 320; 53 L. J. Ch. 353. 76

James *v.* Eve, 6 H. L. 335; 42 L. J. Ch. 335; 22 W. R. 109 27, 58
Jenner's Case, 7 Ch. D. 132; 47 L. J. Ch. 201; 37 L. T. 807; 26 W. R. 291 22
Jennings *v.* Broughton, 22 L. J. Ch. 585; 5 De G. M. and G. 140; 17 Beav. 234 44
Joint Stock Discount Coy. *v.* Brown, 8 Eq. 376; 20 L. T. 692 . 88

Karuth's Case, 20 Eq. 506: 44 L. J. Ch. 622 21
Kelner *v.* Baxter, 2 C. P. 174; 15 L. T. 213; 15 W. R. 278 32, 33
Kent Building Society, 30 L. J. Ch. 785; 4 L. T. 610; 9 W. R. 686; 1 Dr. and Sm. 417 96

Lake *v.* Duke of Argyll, 14 L. J. Q. B. 73; 6 Q. B. Cas. 477 . 31
Lambert *v.* Neuchatel Asphalte Coy., 51 L. J. Ch., 882; 47 L. T. 73; 30 W. R. 913 104
Lambert *v.* Northern Railway of Buenos Ayres, 18 W. R. 180 . 19
Land Credit Coy. of Ireland *v.* Lord Fermoy, 8 Eq. 7; 5 Ch. 763; 39 L. J. Ch. 477; 23 L. T. 439; 18 W. R. 1,089 . . 86, 108
Larking, *ex parte*, 4 Ch. D. 566; 46 L. J. Ch. 235 . . . 89
Lees *v.* Tod, 9 C. of S. Cas. 807 106
Lewis's Case, 26 L. T. 673; 20 W. R. 519 19
Logan, *ex parte*, 9 Eq. 149 12
London and Staffordshire Fire Coy., 24 Ch. D. 149; 48 L. T. 955; 31 W. R. 781 75
London Financial Association *v.* Kelk, 1884, W. N. 67 . . . 81
Looker *v.* Wrigley, 9 Q. B. D. 397; 46 J. P. 758 95
Lumley *v.* Wagner, 1 De G. M. and G. 604; 21 L. J. Ch. 898; 16 Jur. 871 7
Lyster's Case, 4 Eq. 233; 36 L. J. Ch. 616 63

McCollin *v.* Gilpin, 6 Q. B. D. 516; 44 L. T. 914; 29 W. R. 408 92
Macdougall *v.* Gardiner, 10 Ch. 606; 1 Ch. D. 13; 45 L. J. Ch. 27; 24 W. R. 118 73
McGowan *v.* Dyer, 8 Q. B., 141; 21 W. R. 560 9
Macgregor *v.* Dover and Deal Railway, 22 L. J. Q. B. 69; 17 Jur. 21; 18 Q. B. Cas. 618 96

Mackay *v.* Commercial Bank, 5 P. C. 394; 43 L. J. P. C. 31; 30 L. T. 180; 22 W. R. 473 9
McKay's Case, 2 Ch. D. 1; 45 L. J. Ch. 148; 33 L. T. 517; 24 W. R. 490 89
Maclure, *ex parte*. 5 Ch. 737; 39 L. J. Ch 685; 23 L. T. 685; 18 W. R. 1122 13
McNaughton *v.* Brunton, 10 C. of S. Cas. 111 (Sc.) . . . 18
Maddick *v.* Marshall, 11 L. T. 611; 13 W. R. 205; 17 C. B., N. S. 829; 10 Jur. 1201 32
Mahony *v.* East Holyford Mining Coy., 7 H. L. 869, 33 383 83, 99
Mammoth Copperopolis of Utah, 50 L. J. Ch. 11; 43 L. T. 754 . 110
Mason and Gallagher's Case, 46 L. T. 54; 30 W. R. 742 . . . 83
Massey *v.* Allen, 9 Ch. D. 164; 47 L. J. Ch. 702; 26 W. R. 908 . 112
Master's Case, 7 Ch. 292; 41 L. J. Ch. 501; 20 W. R. 499 . . 55
Menier *v.* Hooper's Telegraph Works, 9 Ch. 350; 43 L. J. Ch. 330; 30 L. T. 209; 22 W. R. 257, 396 77
Metropolitan Bank *v.* Hoiron, 5 Ex. D. 319 . . . . 64, 110
Miller's Case, 5 Ch. D. 70. 24
Moseley *v.* Cressey's Coy., 1 Eq. 405; 14 W. R. 246 . . . 30
Mozley *v.* Alston, 16 L. J. Ch. 873; 1 Ph. 790 85
Munster v. Cammell & Coy., 21 Ch. D. 183, 51 L. J. Ch. 731; 47 L. T. 44; 30 W. R. 812 . . . . . 17, 63
Murray *v.* Bush, 6 H. L. 37; 42 L. J. Ch. 586; 29 L. T. 217; 22 W. R. 280 . . . . . 22, 56

National Funds Assurance, 10 Ch. D. 118; 48 L. J. Ch. 163; 39 L. T. 420; 27 W. R. 302 106
Native Iron Ore Coy., 2 Ch. D. 345; 45 L. J. Ch. 517; 34 L. T. 777; 24 W. R. 503 68
New Brunswick, &c., Ry. *v.* Muggeridge, 1 Drew & Sm. 363 . 39
New London & Brazilian Bank *v.* Brocklebank, 21 Ch. D. 302; 51 L. J. Ch. 711; 47 L. T. 8; 30 W. R. 737 . . . 53
Nockels *v.* Crosby, 3 B. & Cr., 814; 5 D. & R. 751 . . . 30
North Eastern Ry. *v.* Jackson, 19 W. R. 198 . . 2, 18, 21, 89

Okell *v.* Charles, 34 L. T. 822 91
Overend *v.* Gibb, 5 H. L. 480; 42 L. J. Ch. 67 86
Overend, Gurney & Coy., *ex parte*, 4 Ch. 460; 20 L. T. 641; 17 W. R. 689 94

Parker *v.* McKenna, 10 Ch. 96; 44 L. J. Ch. 425; 31 L. T. 739; 23 W. R. 271 28

Partridge *v.* Albert Life, 16 Sol. J. 199 9
Patent Cocoa Fibre Coy., 24 W. R. 483 76
Payne's Case, 9 Eq. 223 54
Pearson's Case, 5 Ch. D. 336; 46 L. J. Ch. 339; 25 W. R. 618 . 101
Peek *v.* Gurney, 6 H. L. 377; 43 L. J. Ch. 19; 22 W. R. 29 36, 39, 43, 44
Pelly, *en parte*, 21 Ch. D. 492; 31 W. R. 177 . . . . 103, 110
Pender *v.* Lushington, 6 Ch. D. 70; 46 L. J. Ch. 317 . . . 78
Penney, *ex parte*, 8 Ch. 446; 42 L. J. Ch. 183; 28 L. T. 150; 21 W. R. 186 54
Perry's Case, 34 L. T. 716 . . . . . 65, 66, 87, 88, 108
Peruvian Rys. *v.* Thames Marine Coy., 2 Ch. 617 64
Phœnix Electric Light Coy., 48 L. T. 260; 31 W. R. 398 . . 78
Phosphate Sewage Coy. *v.* Hartmont, 5 Ch. D. 394; 46 L. J. Ch. 661; 37 L. T. 9 97
Phosphate of Lime Coy. *v.* Green, 7 C. P. 43; 25 L. T. 636 . . 81
Phosphate of Lime Coy., 24 L. T. 932 56
Pickering *v.* Stephenson, 14 Eq. 322; 41 L. J. Ch. 493; 26 L. T. 608; 20 W. R. 654 . . . . . 77, 89
Plaskynaston Tube Coy., 23 Ch. D. 542 58
Plympton Mining Coy. *v.* Wilkins, 1882, W. N. 66 . . 28, 47
Poole's Case, 9 Ch. D 322; 38 L. T. 659; 26 W. R. 823 . . 84
Pooley Hall Colliery Coy., 21 L. T. 690 83
Power *v.* O'Connor, 19 W. R. 923 108
Pritchard's Case, 8 Ch. 956; 42 L. J. Ch. 768; 29 L. T. 363; 21 W. R. 669 6
Pulbrook *v.* Richmond Mining Coy. 9 Ch. D. 610 . 23, 63, 83

Railway Light Coy., 42 L. T. 206; 28 W. R. 541 . . . 87
Ramwell's Case, 50 L. J. Ch. 827; 45 L. T. 431; 29 W. R. 882 . 57
Rance's Case, 6 Ch. 104; 40 L. J. Ch. 277; 23 L. T. 828; 19 W. R. 291 105
Ranger *v.* Great Western Ry., 5 H. L. C. 72 9
Rashdall *v.* Ford, 2 Eq. 750; 35 L. J. Ch. 769; 14 L. T. 790; 14 W. R. 950 97
Reese River Silver Mining Coy. *v.* Smith, 4 H. L. 64; 39 L. J. Ch. 849 38
Reg. *v.* Catholic Life Institution, 49 L. T. 675; 47 J. P. 503 . 71
Reg. *v.* Government Stock Investment Coy., 3 Q. B. D. 442; 47 L. J. Q. B. 478; 39 L. T. 230 79
Reg. *v.* Gurney and others (Overend, Gurney & Coy.) . . . 115
Reg. *v.* Murch and others (West of England Bank) 118

Reg. *v.* Stewart and others (City of Glasgow Bank) 119
Reynolds, *in re*, 20 Ch. D. 294; 51 L. J. Ch. 756; 46 L. T. 508; 30 W. R., 651 113
Richardson *v.* Williamson, 6 Q. B. 276; 40 L. J. Q. B. 145 . 95, 97
Riley *v.* Pakington, 2 C. P. 536; 36 L. J. C. P. 204; 16 L. T. 382; 15 W. R. 746 32
Robinson *v.* Chartered Bank, 1 Eq. 32; 13 L. T. 454; 14 W. R. 71 . 54
Ross *v.* Estates Investment Coy., 3 Eq. 122; 6 Ch. 682; 37 L. J. Ch. 873; 16 W. R. 1,151 38
Ross *v.* Pender, 1 R. 352 (Sc.) 10
Rossmore *v.* Mowatt, 15 Jur. 238 21
Royal Bank of India's Case, 4 Ch. 252; 19 L. T. 805; 17 W. R. 359 98
Royal British Bank *v.* Turquand, 24 L. J. Q. B., 327; 5 E. & B. 248; 6 E. & B. 327; 1 Jur. 1,086 . . . . . 94, 95

Salisbury *v.* Metropolitan Ry., 22 L. T. 839; 18 W. R. 839 . . 104
Scholefield's Case, 1882, W. N. 22 103
Scottish Petroleum Coy. 23 Ch. D. 413; 49 L. T. 348; 31 W. R. 846 . . . . . 53, 62, 66
Scott *v.* Lord Ebury, 2 C. P. 255; 36 L. J. C. P. 161; 15 L. T. 506; 15 W. R. 517 33
Sharp *v.* Dawes, 2 Q. B. D. 26; 46 L. J. Q. B. 104; 36 L. T. 188; 25 W. R., 66 78
Ship *v.* Crosskill, 10 Eq. 73; 39 L. J. Ch. 550; 22 L. T. 365; 18 W. R. 618 38
Shireff's Case, 14 Eq. 417; 42 L. J. Ch. 5; 20 W. R. 966 . 13
Shropshire Railway Coy. *v.* The Queen, 7 H. L. 496; 45 L. J. Q. B. 31; 32 L. T. 283; 23 W. R. 709 56
Slee *v.* International Bank, 17 L. T. 425 54
Smith *v.* Anderson, 15 Ch. D. 247; 50 L. J. Ch. 39; 43 L. T. 329; 29 W. R. 21 3
Smith *v.* Chadwick, 20 Ch. D. 27; 51 L. J. Ch. 597; 46 L. T. 702; 30 W. R. 661 . . . . . 37, 40, 42
Smith *v.* Duke of Manchester, 24 Ch. D. 611; 49 L. T. 96; 32 W. R. 83 87
Smith's Case, 11 Ch. D. 579; 48 L. J. Ch. 480; 40 L. T. 572; 27 W. R. 845 68
Stapleford Colliery Coy., 49 L. J. Ch. 253; 42 L. T. 12; 28 W. R. 341 91
Stock's Case, 4 De G. J. and S. 426 24
Strand Music Hall, 13 L. T. 177, 3 De G. J. and S. 147 . . . 81
Stranton Iron Coy., 16 Eq. 559; 43 L. J. Ch. 215 54

Stringer, *ex parte*, 9 Q. B. D., 436 53
Stringer's Case, 4 Ch. 475; 20 L. T., 502; 17 W. R. 694 . . 104, 111
Sullivan *v.* Metcalfe, 5 C. P. D. 455; 49 L. J. C. P. 815; 44 L. T. 8; 29 W. R. 181 . . . . . 49, 50
Swift *v.* Jewesbury, 9 Q. B. 301; 43 L. J. Q. B., 56; 30 L. T. 31; 22 W. R. 319 10
Swift *v.* Winterbotham, 8 Q. B. 244; 42 L. J. Q. B. 111; 28 L. T. 338; 21 W. R. 562 10
Sykes' Case, 13 Eq. 255; 41 L. J. Ch. 251; 26 L. T. 92 . . . 19

Taurine Coy., 25 Ch. D. 118; 52 L. J. Ch. 688; 49 L. T. 514; 32 W. R. 129 62
Taylor *v.* Ashton, 12 L. J. Ex. 363; 11 M. and W. 401; 7 Jur. 978 42
Totterdell *v.* Fareham Brick Coy., 1 C. P. 674; 35 L. J. C. P. 278; 14 W. R. 919 62
Tucker *v.* Barker, 1881 W. N. 120 58
Turquand *v.* Marshall, 4 Ch. 376; 38 L. J. Ch. 639 . . . 86, 106
Twycross *v.* Grant, 2 C. P. D. 469; 46 L. J. C. P. 636; 36 L. T. 812; 25 W. R. 701 . . . . . 43, 46, 47, 48, 49, 50
Tyrell *v.* Bank of London, 31 L. J. Ch. 369; 6 L. T. 1; 10 W. R. 359; 10 H. L. C. 26 . . . . . 28, 89

Ulster Ry. *v.* Banbridge Ry., L. R. 2 Eq. 190 (Ir.); 16 W. R. 598 . 84
Union Hill Coy., 22 L. T. 400 72

Vale of Neath Brewery Coy., 18 L. J. Ch. 265 96

Walker, *ex parte*, 18 Jur. 885 81
Walker's Case, 2 Eq. 554; 35 L. J. Ch. 826; 14 L. T. 32; 14 W. R. 1008 54
Walstab *v.* Spottiswoode, 15 M. and W. 501; 15 L. J. Ex. 193; 10 Jur. 498; 4 Railway Cas. 321 30
Wandsworth Gas Light Coy. *v.* Wright, 22 L. T. 404; 18 W. R. 728 17
Webb *v.* Commissioners of Herne Bay, 5 Q. B. 642; 39 L. J. Q. B. 221; 22 L. T. 745; 19 W. R. 241 94
Wedgwood Coal and Iron Company, 47 L. T. 612 2
Weeks *v.* Propert, 8 C. P. 427; 42 L. J. C. P. 129; 21 W. R. 676 . . . . . 92, 95
Weir *v.* Barnett, 3 Ex D. 32; 26 W. R. 147 36
Weir *v.* Bell, 3 Ex D. 238; 47 L. J. Ex 704; 38 L. T. 929; 26 W. R. 746 88

West London Bank *v.* Kitson, 12 Q. B. D. 157; 50 L. T. 208; 53 L. J. Q. B. 218 97
Weston's Case, 4 Ch. 20; 38 L. J. Ch. 49; 19 L. T. 337 . . . 53
Whaley Bridge Printing Coy. *v.* Green, 5 Q. B. D. 109; 49 L. J. Q. B. 326; 41 L. T. 674; 28 W. R. 351 26
Wilson, *ex parte*, 8 Eq. 240; 38 L. J. Ch. 526; 21 L. T. 164; 17 W. R. 979 53
Wilson *v.* Lord Bury, 5 Q. B. D. 518; 50 L. J. Q. B. 90; 44 L. T. 454; 29 W. R. 269 109
Wilson *v.* Miers, 10 C. B. N. S. 348; 3 L. T. 780 93
Wood *v.* Duke of Argyll, 13 L. J. C. P. 96; 6 M. and G. 928 . . 31
Working Man's Mutual Society, 21 Ch. D. 831; 51 L. J. Ch. 850; 30 W. R. 938 113
Wynn Hall Coal Coy., 10 Eq. 515; 39 L. J. Ch. 695; 23 L. T. 348; 18 W. R. 1128 68

Yelland's Case, 4 Eq. 350 12
York and North Midland Ry. *v.* Hudson, 16 Beav. 485; 22 L. J. Ch. 529 . . . . . 21, 102
Yorkshire Wagon Coy. *v.* Maclure, 19 Ch. D. 478: 51 L. J. Ch. 253, 857; 45 L. T. 747; 30 W. R. 288, 761 96
York Tramways Coy. *v.* Willows, 8 Q. B. D. 685; 51 L. J. Q. B. 257; 46 L. T. 296; 30 W. R. 624 . . . . . 57, 62

Zulueta's Claim, 5 Ch. 444; 39 L. J. Ch. 598; 18 W. R. 778 . . 98

THE LAW OF DIRECTORS AND OFFICERS OF JOINT STOCK COMPANIES.

CHAPTER I.

DIRECTORS.

THE office of a director of a joint-stock company is one of considerable importance, and may involve the holder in liabilities of no light description.

The responsibility of the management of a company devolves, as a rule, upon its directors. It is not legally essential that a company should have directors.

Directors are often referred to as agents, trustees or managing partners of the company; and when they are so spoken of by judges it is essential to recollect that such expressions are used, not as exhaustive of the powers or responsibilities of those persons, but only as indicating useful points of view from which they may for the moment and for the particular purpose be considered—points of view at which they seem for the moment to be either cutting the circle or falling within the category of the suggested kind. It is not meant that they belong to the category, but that it is useful for the purpose of the moment to observe that they fall *pro tanto* within the principles which govern that particular class. Directors are not exactly agents nor exactly servants—perhaps not servants at all—nor exactly trustees,

nor exactly managing partners, if by that is meant that they are nothing more and nothing less. They are persons invested with strictly defined powers of management under the articles of association of a statutory corporation. [Per Bowen, L. J. *Imperial Hotel Company* v. *Hampson*, 23 Ch. D. 12.]

Unless the articles of a company otherwise provide there is no restriction as to the choice of directors. There is nothing to prevent the office of director being filled by a woman, an infant, or an alien.

The only statutory exception is in the case of a beneficed clergyman, or a clergyman who is licensed, or otherwise allowed to perform the duties of any ecclesiastical office whatever. By 1 & 2 Vict. c. 106, s. 29, it is enacted that it shall not be lawful for any such person to act as a director or managing partner of a company; but sect. 30 qualifies this restriction, and expressly allows him to be a manager, director, partner, or shareholder in any benefit society or fire or life assurance society.

The articles of association usually invest the directors with very ample powers for carrying on the business of the company.

A director stands in a fiduciary relation towards the company. He is not allowed to make any profit out of the position he thus holds, other than that allowed by the regulations of the company or by the consent of its members. [*North Eastern Railway* v. *Jackson*, 19 W. R. 198].

If a director is guilty of any misfeasance or breach of trust towards the company he is liable to the company in respect of those acts; but he is not in general liable for losses arising through non-feasance. [Cf. *Wedgwood Coal and Iron Company*, 47 L. T. 612.]

In considering the position of directors it must be borne in mind that a director differs from a trustee. For whilst a

trustee is the legal owner of the trust-property, and as such is the principal who deals with that property, and is master thereof, subject only to an equitable obligation to account to his *cestuis que trustent*, a director occupies as between himself and the company the position of a paid servant. [*Smith* v. *Anderson*, 15 Ch. D. 247.]

A limited company may, by its memorandum of association, as originally framed, or as altered by special resolution, declare the liability of its directors or managers, or of its managing director, to be unlimited. [C. A. 1867, ss. 5–8.]

In any limited company where the liability of a director or manager is unlimited, notice in writing is to be given to any proposed director or manager that on his election his liability will be unlimited. The omission of this notice will not, however, affect his liability.

A retiring director or manager, whose liability is unlimited, is only liable for debts and liabilities incurred during his tenure of office, and this liability ceases at the end of one year from his retirement.

In the event of the company being wound up, a director or manager whose liability is unlimited will only be called upon to contribute if the Court thinks the general assets insufficient to pay the debts of the company.

If he is called upon to contribute he will be liable to contribute as if he had been at the date of the commencement of such winding up a member of an unlimited company, and will be allowed to set off as against his liability any debt that may be due to him from the company.

It is believed that these powers of imposing unlimited liability upon the directors and managers of a company are seldom if ever availed of, as few persons can be found willing to assume this liability, without receiving corresponding advantages. If the practice were adopted of appointing boards of directors, with unlimited liability, for fixed periods,

it may be inferred with safety that fewer companies would make shipwreck through the neglect and mismanagement of directors. Under the system at present in vogue no person has any vital interest in the success of the company. Under a system of unlimited liability of a class the interests of the directors would be completely identified in the well-being of the company.

CHAPTER II.

OFFICERS.

THE legal position of the manager, secretary, or other officer of a company differs little from the position of any ordinary servant. He occupies no special fiduciary relation towards the company, he owes no special duty to the board; the ordinary relations of employer and employed obtain between himself and the company; he incurs no liability for the debts of the company; he is not responsible for the acts of his directors. He is a servant, nothing more. He is bound to obey the lawful orders of his superiors; he is liable to be suspended or dismissed at their pleasure.

Whatever remedies for wrongful dismissal a servant in ordinary employ may have against his master, such remedies also has the discharged officer of a company against the company.

Against the directors themselves personally he has no remedy for any act of wrongful dismissal of which, in their capacity as directors, they may have been guilty; his employers are the company, of which the directors are the agents, he must look to the company alone to recompense him for the wrongful act of their agent.

As an officer of the company he has, it is conceived, no right to question the legality of the appointment of its directors. So long as the shareholders allow the affairs of the company to remain in the hands of persons invalidly appointed as directors it would seem that the officers of the company are justified in obeying the *de facto* directors without being responsible for the fact that they were not directors *de jure*.

The articles of association usually allot certain duties to the secretary and manager. Where this is the case it is the business of the directors to see that these duties are fulfilled. But the officer has himself no right to insist on performing those duties, nor will any action lie by him against the company or the directors to compel them to allow him to perform them. He is no party to the articles, which are a matter only between the directors and shareholders; it may well be that the directors may be liable to the shareholders for any disregard of those articles, but the officer is an outsider, and can ground no action on the articles of association. [*Eley* v. *Positive Life Assurance*, 1 Ex. D. 88; *Pritchard's Case*, 8 Ch. 956.]

A servant is bound to obey all his master's reasonable and lawful commands, but his contract of service imposes on him no obligation to commit or assist in committing any fraud or wrong, even although he may have been ordered to do so by his master.

All persons directly concerned in the commission of a fraud are to be treated as principals. No party can be permitted to excuse himself on the ground that he acted as the agent or as the servant of another; and the reason is clear, for the contract of agency or of service cannot impose any obligation on the agent or servant to commit or assist in committing any fraud or wrong. [*Cullen* v. *Thomson*, 6 L. T. 870.]

Any servant who obeys his master's lawful commands is entitled to be indemnified by his master against any loss he may sustain through such obedience; but if he obeys his master's unlawful commands he is entitled to no indemnity even although his master may have expressly promised to indemnify him against the consequences of the unlawful acts.

Any servant who is negligent in his master's service is

liable to his master for any loss he may have sustained through such negligence.

If a servant engages to enter into the service of a person in any capacity it is his duty to fulfil his engagement by entering that service, and if he fail to do so without any good reason he will be liable to an action for such breach of contract. [*Cotes* v. *Sadler*, 2 Keb. 16; *Lumley* v. *Wagner*, 1 De G. M. & G. 604.]

It is equally his duty, having entered into the service, to continue in such service during the whole time he has contracted for, and if he depart without any good reason he will be liable to an action for so doing. [*Bird* v. *Randall*, 3 Burr. 1,345.]

In either of the above cases if the servant were prevented by the act of God, *e.g.*, permanent illness, that would be a good defence to an action. [*Boast* v. *Firth*, 4 C. P. 1.]

In all these respects the contract of service between an officer and the company differs in no way from that of a servant in ordinary employ.

The officers of a company are, however, under certain statutory obligations—these relate for the most part to purely ministerial acts, such as keeping proper registers, permitting inspection by shareholders, making annual returns, and affixing the name of the company to all documents. These statutory duties will be found summarised in a later part of this work (page 67). In all instances the directors are equally bound with the officers of the company.

There is one statutory obligation with reference to the prospectus which affects the officers of a company. They are bound to see that every share prospectus issued by the company specifies the dates and names of the parties to any contract entered into by the company or the promoters, directors or trustees, before the issue of such prospectus. Every liability which attaches to the directors for neglect of

this duty, attaches equally to the officers of the company knowingly issuing the same. This liability is dealt with at length further on in this work (page 45).

With this exception it would seem that the secretary, manager, or other officer of a company incurs, as such, no responsibility for allowing his name to appear on any prospectus of the company. His name appears thereon as a servant of the company, and it is conceived that he would not be held to be liable for the truth of the matters set out in the prospectus, of which, it may be assumed, he most frequently knows nothing. Of course, if he takes any active part in the issue of the prospectus, so as to bring him into the category of "promoter," he at once becomes liable to the fullest extent, and it is immaterial in that event whether or not his name was appended to the prospectus. [*Re Great Wheal Polgooth*, 53 L. J. Ch. 42].

The general scope of authority of the officers is limited to the ordinary conduct of the routine business of the company. Directors can only delegate to any officer those duties which belong to the management of the ordinary commercial business of the company. [*Cartmell's Case*, 9 Ch. 691.] Any further powers which the officers may exercise must be in virtue of authority expressly delegated to them by the directors under express powers in that behalf contained in the articles. [*Howard's Case*, 1 Ch. 561.]

The duties of the secretary in general include the care of the common seal, the keeping of the share register, and the registers of transfers and of mortgages. He also usually is present at all board meetings, to take all necessary notes of the proceedings to enable him to enter upon the minutes of the board a correct record of the resolutions passed thereat. He has usually, in the case of small companies, entrusted to his supervision the whole of the routine of the office of the company, and frequently also its general management.

Any officer of the company whilst acting in that capacity, and within the scope of his authority, can bind the company as fully as the board itself.

But for an officer to bind the company, he must be acting as such, and not in his private capacity. [*McGowan* v. *Dyer*, 8 Q. B. 141.] He must also be acting within the scope of his authority. Thus, if an officer, not being a director, takes it upon himself to answer inquiries not properly within the scope of the business entrusted to him, he will not thereby render the company liable for his answers. [*Partridge* v. *Albert Life*, 16 Sol. J. 199.]

The general rule that a master is liable for the wrongful acts of his servants acting in the course of the service, and for the master's benefit, though no express command or privity of the master be proved, applies equally to companies. The company may not have authorised the particular act, but if it has put the agent in its place to do that class of acts, it must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of the company to entrust to him. [*Barwick* v. *English Joint Stock Bank*, 2 Ex. 259.]

The fraud of the agent in the course of his service is the fraud of his principal. Strictly speaking, a corporation cannot of itself be guilty of a fraud. But where a corporation is formed for the purpose of carrying on a trading or other speculation for profit, such as forming a railway, these objects can only be accomplished by the agency of individuals; and there can be no doubt, that if the agents employed conduct themselves fraudulently, so that if they had been acting for private employers, the persons for whom they were acting would have been affected by their fraud, the same principles must prevail where the principal under whom the agent acts is a corporation. [*Ranger* v. *Great Western Railway*, 5 H. L. C. 72; *Mackay* v. *Commercial Bank*, 5 P. C. 394.]

The fact that the company is liable does not absolve the agent from his fraud. Thus, any director or other officer of a company committing, or assenting to the commission of a fraud on behalf of the company, is himself personally liable to the fullest extent, and may be sued either alone or jointly with the company. In actions of tort, all persons liable for the commission of the tort, whether principals, agents, or servants, are liable to be sued jointly. [*Swift* v. *Winterbotham*, 8 Q. B. 244; *Swift* v. *Jewesbury*, 9 Q. B. 301.]

The secretary, manager, or other officer of the company, stands in the same relation to the company, his employers, as a clerk in private employ does to his master. If he is discharged improperly, or without due notice, he is entitled to recover such damages as a jury may think sufficient to compensate him for the actual loss which he has sustained. It must be borne in mind, that on any dismissal it is the servant's duty to endeavour to procure other employment, and not to remain idle. The true measure of his damages is not the amount of wages which he might have earned had he remained in his situation, but the probable or actual loss sustained by his dismissal. Assuming that he obtained forthwith a better position, his damages would be nominal only. But though he is bound to seek other employment, he is not bound to accept an inferior position to that he formerly occupied. [*Ross* v. *Pender* (Sc.), 1 R. 352.]

The length of notice depends either on agreement or custom; if there be neither, the notice must in all cases be a reasonable one, and this is decided by the jury. A hiring at a yearly salary is, in general, a hiring for a year, and thereafter, if continued, from year to year, determinable by a reasonable notice at the end of any year. But there is no inflexible rule that a general hiring is for a year. In the case of clerks, three months' notice from any time in all cases would seem to be that reasonable notice to which they

are entitled; but this would not seem to apply to the case of a manager or secretary, who it would seem would be entitled to his salary up to the end of the year. The length of notice is a question entirely for the jury. [*Foxall* v. *International Land Credit Company*, 16 L. T. 637; *Creen* v. *Wright*, 1 C. P. D. 591; *Buckingham* v. *Surrey and Hants Canal*, 46 L. T. 885.]

Wilful disobedience, habitual negligence, gross insolence, want of skill, dishonesty or permanent sickness, are grounds for dismissal of servants without any notice. A servant so dismissed forfeits all wages accruing and not due up to the date of dismissal. It is sufficient that a valid reason for the dismissal exists at the time, even though it may be discovered afterwards. The master need assign no reason for the dismissal.

In the event of the winding up of a company it is now provided by the Companies Act, 1883, that "all wages or salary of any clerk or servant in respect of service rendered to the company during four months before the commencement of the winding up not exceeding £50, and all wages of any labourer or workman in respect of services rendered to the company during two months before the commencement of the winding up," shall be paid in priority to all other debts forthwith out of the first funds of the company, subject only to the retention of the necessary costs of winding up.

An order for the winding up of a company is notice of discharge to the servants of the company from the date of the order. The servants will be entitled to prove for their salaries on the footing of having had notice of discharge on the day the order was made. [*Chapman's Case*, 1 Eq. 346.]

Yet where the business is continued after the winding up order, and there is actual business to occupy the services of clerks, the old contract between the company and its servants continues in force, and notice of discharge must be given

pursuant thereto. [*Re English Joint Stock Bank, Ex parte Harding*, 3 Eq. 341.]

Amongst the claims generally admitted to proof against the company are those made by officers of the company for compensation for loss of employment.

In all cases of appointments for fixed periods the rule adopted is to allow the officer or agent to prove for his full salary for the unexpired term, less an estimated sum, in consideration of his being free to accept another appointment. [*Hartland* v. *General Exchange Bank*, 14 L. T. 863.]

In *Yelland's Case*, [4 Eq. 350], the facts were shortly as follows: Mr. Yelland was manager of a branch bank under an agreement for a term of five years at a salary of £500 per annum, and had in addition the right of occupying the bank premises as a dwelling house free of all rent, taxes and other outgoings. The bank stopped payment within the first year of his management. The official liquidator gave him notice to terminate his engagement. Mr. Yelland sent in a claim for £1,958 for three years and 11 months salary at £500 a year, and a further sum of £360, being the equivalent for free residence on the bank premises for the same time. The Court held that Mr. Yelland's claim should be estimated by ascertaining the present value of an annuity of £500 for the unexpired term, and a proper rent for the bank premises for the rest of the term, regard being had to the risk of health and life. From the amount so ascertained something was to be deducted for Mr Yelland being at liberty to obtain a fresh appointment.

In another case where a company had sent an agent to a colony on a five years' agreement, the Court in a winding up made a similar order to that in Yelland's Case, and in addition allowed the agent a proper sum for the expenses of the return voyage of himself and his wife. [*Ex parte Clark*, 7 Eq. 550; *Ex parte Logan*, 9 Eq. 149.]

Any special stipulation must also be taken into consideration; thus, where by the articles it was provided that in case of the dismissal of the manager he should be paid the full amount of money paid by him upon his shares, and the company was wound up voluntarily, the manager being appointed liquidator, it was held that the winding-up was equivalent to a dismissal, and that he was entitled to prove for the amount paid on his shares, subject to a set-off as to his remuneration as liquidator. [*Shireff's Case*, 14 Eq. 417.]

But where an agent was appointed for five years to transact no business except for the company, at a fixed salary and a commission on all business, it was held that he was not entitled to prove against the company for the loss of his commission, though he was at liberty to prove for his salary. An agreement to pay commission upon business transacted does not give the servant any right to determine what the extent of the business is to be. He cannot call upon the directors to carry on the business. By such a contract it is never intended to give the servant the right of dictating as to the extent of the business whether more or less, or nothing; he simply takes the chance of the company finding it a profitable business and carrying it on. The company has the right to reduce the business to a minimum or to nothing, so far as he is concerned. [*Ex parte Maclure*, 5 Ch. 737.]

But an agent, such as a commercial traveller, who has been employed by a company for a fixed term, who is to be paid no salary, but who is to receive a commission on all orders obtained through him, as the sole remuneration for his services, is entitled, upon the determination of the agreement by the winding up of the company, to claim compensation in respect of the commission which he might otherwise have earned during the unexpired portion of the term. The principle involved in this decision is that the agent being remunerated only by commission, and being indubitably

injured by the withdrawal of his agency before the period fixed, is entitled to compensation of which it would be unjust to deprive him merely because his salary and commission were virtually combined under the term "commission." [*Dean and Gilbert's Case*, 41 L. J. Ch. 476.]

CHAPTER III.

APPOINTMENT, REMOVAL, REMUNERATION AND QUALIFICATION.

WITH respect to the appointment of directors the articles of association of a company usually prescribe the manner of their election and the amount of their share qualification, if any. It is also customary to nominate the first directors in the articles themselves; in default of such nomination the subscribers to the memorandum and articles are invested by Table A (see Appendix) with full powers to appoint the first directors and to act as directors in the interim.

It is by no means uncommon for the articles to contain clauses appointing persons as managing directors, secretaries, managers, or to occupy other positions, for fixed periods, on certain terms therein stated. In some instances even the articles contain provisions appointing certain favoured individuals to positions in the service of the company and making them irremovable except for actual misconduct.

All such appointments do not in any way bind the company to employ such persons upon the terms specified or on any other terms. Such provisions constitute no contract between the company and those persons.

The articles of a company, taken by themselves, are simply a contract between the shareholders, *inter se*; and cannot give a right of action to persons not parties to the articles although named therein. [*Eley* v. *Positive Life Assurance*, 1 Ex. D. 88.]

Nor is any such person in any better position by the fact

that he himself has signed the articles as one of the subscribers.

The only way in which directors, promoters or other persons wishing to secure to themselves special positions in the company can safely effect that purpose is by procuring the board of directors to make the desired appointment at any time after the incorporation of the company.

It may well be doubted whether the general implied powers of directors would at any time be sufficient to enable them to make "irremovable" appointments; it is a grave question whether such appointments would not be obnoxious to the principles of public policy and would not constitute a contract which the Court would refuse to enforce. [*Eley* v. *Positive Life Assurance*, 1 Ex. D. 88.]

To constitute a valid appointment a director must be fully qualified in all respects in accordance with the requirements of the articles, and all formalities respecting his election must have been strictly observed. [*Hamley's Case*, 5 Ch. D. 705; *Barber's Case*, 5 Ch. D. 963; *Carmichael's Case*, 46 L. T. 653.]

When once appointed a director continues to hold office until the period fixed by the articles for his continuance in that position has expired, or until he has disqualified himself from acting, by parting with his share qualification, if any, by becoming bankrupt, by holding an office of profit under the company such as that of secretary, or manager, or otherwise as the articles may prescribe. [*Eales* v. *Cumberland Black Lead Company*, 30 L. J., Ex. 141; *Imperial Mercantile Association* v. *Coleman*, 6 H. L. 189.]

The articles usually prescribe that the company in general meeting shall from time to time appoint new directors. They usually also contain a clause to the effect that casual vacancies at the board may be filled up by the directors. A casual vacancy may be defined as any vacancy in the office of

directors arising otherwise than by retirement in rotation as provided by the articles. It has been held that this power is properly exerciseable after a general meeting in respect of a casual vacancy which occurred before such meeting, and which the shareholders had omitted to fill up. [*Munster* v. *Cammell & Co*, 21 Ch. D. 183.]

Persons who are declared by the chairman of the meeting to be duly elected directors, and are so described on the minutes of the proceedings, must be deemed, in the absence of fraud, to be so elected, and are entitled to act, notwithstanding that their election is disputed. If any dispute arises as to the propriety of the election of a director, the simple and proper course is to call another general meeting and get the whole thing set right. [*Wandsworth Gas Light Company* v. *Wright*, 22 L. T. 404.]

Where persons were elected directors (owing to the rejection of several thousand adverse votes given by irregular proxies) and the remainder of the board declined to receive them, the Court refused to interfere to force those persons so elected on the company against its will, as evidenced by a substantial majority at a subsequent meeting. [*Harben* v. *Phillips*, 23 Ch. D. 14.]

A company has no inherent power to remove any of its directors before the period of his service is expired. There is no doctrine of the common law, and there is no statutory provision which enables the shareholders to vary the contract entered into between themselves that the directors shall hold office for a given period, supposing that there is a contract which does not contain the power of removal. In the absence of that special power, there is no inherent power of removal contained either in the statutes or the articles.

If the regulations of the company either prohibit the removal of the directors, or contain no provision like that of Article 65 of Table A, for the removal of the directors, such

a provision can be inserted in the articles of association by special resolution. Therefore, whenever the occasion arises that it is required to remove a director without special cause shown, that object can only be accomplished under a power of removal in the articles of association, and when the company has given itself the power of removing the director, it can then proceed to exercise that power by an act of removal. [*Imperial Hotel Company* v. *Hampson*, 23 Ch. D. 1.]

Where the articles give the shareholders power to remove the directors for any "reasonable cause," it will be sufficient, in the absence of undue influence, if the "cause" was considered reasonable by the shareholders, and the Court will not go behind their decision. [*Inderwick* v. *Snell*, 2 Mac. & G. 216.]

The right of directors to remuneration depends upon the articles of the company, or the sanction of a general meeting. For if there be no contract providing for their payment directors can maintain no action for reward for their services. The directors occupy the position of managing partners doing that which they have undertaken to do, and that which it is their duty to do; they cannot be considered as servants of the company, and as such entitled to claim remuneration for their labour according to its value. [*Dunston* v. *Imperial Gas Light Company*, 2 B & Ad. 125; *McNaughtan* v. *Brunton*, 10 C. of S. Cas. 111 (Sc).]

Except such remuneration as may be awarded him by the regulations of the company, or the vote of a general meeting, a director is not entitled to make any profits from the business of the company while he is a director, or to receive any other recompense for his services, professional or otherwise. [*North Eastern Railway Company* v. *Jackson*, 19 W. R. 198; *General Exchange Bank* v. *Horner*, 9 Eq. 480.]

If the articles of a company apportion any sum as the

remuneration of the directors, they are entitled to draw that sum in accordance with the articles. Where this is the case any promise by directors to perform their services gratuitously, or for less than the amount apportioned to them, is a mere *nudum pactum*, is no release of their rights, and does not prevent them from recovering the salaries allotted to them under the articles. [*Lambert* v. *Northern Railway of Buenos Ayres*, 18 W.R. 180.]

If, however, the directors offer to forego a portion of their salary and their offer has been communicated to the shareholders, and it can be proved that purchases were made on the faith of that promise, it would become binding on the directors.

The powers of directors to pay themselves the fees allowed to them by the articles of association must like all their other powers be exercised for the benefit of the company, and not with regard to their own particular interests. They are creditors of the company for their fees and no more. They are not entitled to make use of their claim as creditors to get rid of their liabilities as shareholders, as by paying up the amount of their shares in advance of calls so as to provide funds for the payment of their fees at a time when the company was involved in serious embarrassment. [*Sykes' Case*, 13 Eq. 255.]

If a certain sum for fees is apportioned to the directors, either by the articles or by the company in general meeting, the payment of those fees is not dependent upon profits being earned by the company, but the amount is payable out of the assets of the company, like the salary of any other officer, even though the company be insolvent. [*Lewis's Case*, 26 L. T. 673; *Belfast Railway* v. *Belfast and Holywood Railway*, L. R. Ir. 3 Eq. 581.]

It would seem, however, that any unpaid fees owing to directors must rank against the assets of the company in a

winding up, *pari passu* with the ordinary creditors of the company. They are not entitled to claim any priority over other debts as for salary under the Companies' Act, 1883.

A director can sue the company for his fees, if they are owing to him. But before commencing his action he should resign his seat at the board, for his continuance in office is inconsistent with his putting pressure on the company. [*Gaslight Improvement Company* v. *Terrell*, 10 Eq. 168.]

The question of the remuneration of directors for past services, as well as for future services, is within the powers of the company, and the Court will not interfere in such a matter.

There is nothing whatever to prevent a general meeting from voting to directors remuneration for past services. To hold otherwise would be to preclude directors from foregoing their right to remuneration when a company might be in trouble and difficulty, and asserting their moral right to remuneration when the company had become prosperous by reason of their services. Of course, if the majority of the shareholders present think it undesirable or improper to vote remuneration for past services, the directors can have no claim whatever; but in case the majority think it reasonable and fit to vote a sum of money for past services, it appears to be a matter in which the majority can bind the minority.

When, however, it is proposed to vote directors a sum as a recognition of past services, special notice of the intention to propose such a resolution must be given to the shareholders, failing which the remuneration cannot be voted at a ordinary general meeting.

Remuneration for past services cannot be voted by shareholders to directors, when the company is no longer a going concern, and exists only for the purpose of winding up. [*Hutton* v. *West Cork Railway*, 23 Ch. D. 654.]

The same principle applies to special votes to individual

directors. Where it is proposed to remunerate a particular director, special notice of that intention must be given. It is conceived that the general powers of management conferred on directors give them no power to remunerate one of their number without special authority. The law appears to be clear. It is no more competent to the directors, the trustees of the funds of the company, to bestow those funds upon anyone without the knowledge and sanction of the proprietors than it would be for them to apply those funds for their own personal benefit. [*North Eastern Railway Company* v. *Jackson*, 19 W. R. 198; *Rossmore* v. *Mowatt*, 15 Jur. 238; *York and North Midland Railway* v. *Hudson*, 16 Beav. 485.]

Unless the articles of association otherwise provide, it is not necessary that a director should be a shareholder in the company. Indeed the provisions of Table A make no mention of a share qualification for a director.

The articles of association usually prescribe that the necessary qualification for a director shall be the holding of a certain number of shares in the company.

Where the holding of a certain number of shares is a necessary qualification for a director, the mere acceptance of the office only involves an agreement to have the qualifying shares within a reasonable time after becoming a director; and if a person accepting the office retracts the acceptance before the reasonable time has expired, and without having acted as a director, he will not be fixed with the qualification in the event of the company being afterwards wound up. [*Karuth's Case*, 20 Eq. 506.]

The question as to what is a reasonable time depends on the circumstances of each case. [*Brett and Hewitt's Case*, 25 Ch. D. 283.]

It has even been held that a person who was asked to become a director, and who attended two board meetings and

allowed a prospectus to be issued with his name to it, but who never had a fixed intention to become a director, was not liable for his qualification. [*Green's Case*, 18 Eq. 428.]

But where a person whose name had been advertised as a director attended a board meeting and subsequently signed a cheque as a director, it was held that he had acted as a director and was liable for his qualification. [*Harward's Case*, 13 Eq. 30.]

With respect to the qualification of directors, the articles of a company are generally drafted in one of two ways: either to the effect that the qualification of a director shall be the holding of a certain number of shares in the company, or that no person shall be eligible for election as a director unless he is the holder of a certain number of shares. In the former case the person elected becomes a director though he may, by acting as such, render himself liable to take the necessary number of shares from the company. In the latter case the holding of those shares is a condition precedent to his eligibility for election.

Where the holding of a qualification is a condition precedent to the election of a director, any appointment made of a person not so qualified is void *ab initio*. He never becomes a director, but assumes to act as such without authority in defiance of the articles. He may incur liabilities by so acting of a very serious description. [*Hamley's Case*, 5 Ch. D. 705; *Jenner's Case*, 7 Ch. D. 132; *Carmichael's Case*, 46 L. T. 653; *Murray* v. *Bush*, 6 H. L. 37.]

Where the articles of association of a company did not require that a director should be qualified by holding any shares, but the directors passed a resolution (which was not in any way confirmed by the shareholders) that the qualification should in future be 250 shares, it was held that this resolution could not alter the constitution of the company, and that a person who was afterwards elected a director and who acted

in that capacity did not thereby enter into any implied contract to take or hold any shares. [*De Ruvigne's Case*, 5 Ch. D. 306.]

This decision proceeds on the principle that the powers of directors are limited to the ordinary powers of management and such further special powers as may be conferred on them by the articles. The resolution to impose a qualification was clearly beyond the ordinary powers of directors and the articles gave them no special powers on this point.

Where the articles provided that no person should be eligible as a director, unless he held as registered member in his own right a certain amount of shares, it was held that beneficial ownership was not necessary for a qualification, and that a registered holder of the required capital, even though he had transferred his shares to another, was properly eligible. [*Pulbrook* v. *Richmond Mining Co.*, 9 Ch. D. 610.]

It is sufficient that the necessary shares are registered in the name of the director, even though he has not and never has had any personal interest in them.

It would seem that where a director has to hold shares 'in his own right,' the meaning is that the shares must be registered in his sole name and not jointly with any other person, nor in the capacity of executor or administrator, nor as trustee in bankruptcy, nor as the husband of a lady herself a shareholder, nor as committee or guardian of infants and persons of unsound mind.

Even the beneficial ownership of shares which are registered in the name of a third person does not qualify the real owner as a director, as the company cannot look behind the register, but must take the register as conclusive.

In *Forbes' Case* [8 Ch. 768] four persons were named in the articles as directors. It was also provided that every member holding not less than fifty shares should be eligible as director. It was decided on appeal that the provisions as to

qualification did not apply to the original directors. [See also *Hamilton's Case*, 8 Ch. 548]. The reason for this is that being elected a director by force of the articles of association he was not required to take any shares at all. The word "eligible," meaning, capable of being elected at some future election, and such a clause does not impose the duty of obtaining a qualification on a person appointed by the articles. [*Stock's Case*, 4 De G. J. & S. 426.]

Where the holding of a certain number of shares is a necessary qualification for a director, the mere fact of becoming a director does not amount to a contract by the person so appointed to take that number of unpaid shares direct from the company. [*Brown's Case*, 9 Ch. 102.]

A director may after his appointment obtain his qualification from any source; he may buy the shares on the market, or he may take a transfer from a friend, but his time for getting the shares expires when he acts as director, and he thereupon becomes bound to take the shares from the company. [*Miller's Case*, 5 Ch. D. 70; *Hampshire Milk Co.*, 29 W. R. 170.]

Cases have constantly arisen where directors have taken their seats at the board of a new company, being for that purpose qualified by a gift of the necessary shares from the vendors and promoters.

It is a most improper act on the part of directors to accept their qualifications from persons with whom they ought to be in a position to treat at arm's length. Such conduct constitutes a grave dereliction of their duty, and is a misfeasance for which they render themselves liable to account to the company. The subject is further discussed in the Chapter on Misfeasance.

CHAPTER IV.

PROMOTERS.

In the early stages of a company's existence the relations of the various parties concerned in its promotion differ considerably before and after its incorporation.

Before the incorporation of the company by registration, it is obvious that it can incur no liabilities and can enter into no engagements. It is not even competent with a company to ratify any undertaking entered into on its behalf before it had any legal existence; at the most it can only adopt such contracts which thereupon become binding from the date only of their adoption. [*Empress Engineering Company*, 16 Ch. D. 125.]

Persons, therefore, who interest themselves in the formation of a company, whilst unable to contract on behalf of the company so as to bind it, are still placed in a position where such contracts may remain binding on themselves, and moreover, they stand in a fiduciary position towards the intended though non-existent company. It is well settled law that a promoter holds a fiduciary position towards a company, even before it has any legal existence. [*Bagnall* v. *Carlton*, 6 Ch. D. 371.]

It becomes material in this connection to consider the question: what constitutes a promoter? So far as it relates to persons engaged in getting up a company meaning to make a cash profit thereout, the answer is easy; but when regard is had to the large number of persons who are more or less engaged in and about the formation of a company it appears difficult to decide where to draw the line between a

promoter and a non-promoter; the question depends, however, upon the facts of each particular case. The term "promoter" is a term not of law, but of business, usefully summing up in a single word a number of business operations familiar to the commercial world by which a company is generally brought into existence. A man who carries about an advertising board in one sense promotes a company, but what is to be looked at is not a word or name, but the acts and relations of the parties towards the company. [*Whaley Bridge Printing Company* v. *Green*, 5 Q. B. D. 109.]

Promoters stand "undoubtedly in a fiduciary position. They have in their hands the creation and moulding of the company; they have the power of defining how and when and in what shape and under what supervision it shall start into existence, and begin to act as a trading corporation. If they are doing all this in order that the company may as soon as it starts into life, become, through its managing directors, the purchaser of the property of themselves, the promoters, it is incumbent upon the promoters to take care that in the formation of the company they provide it with an executive, that is to say, with a board of directors, who shall both be aware that the property which they are asked to buy is the property of the promoters, and who shall be competent and impartial judges as to whether the purchase ought or ought not to be made. I do not say that the owner of property may not promote and form a joint stock company, and then sell his property to it; but I do say that if he does, he is bound to take care that he sells it to the company through the medium of a board of directors who can and do exercise an independent and intelligent judgment on the transaction, and who are not left under the belief that the property belongs not to the promoter but to some other person." [*Erlanger* v. *New Sombrero Phosphate Company*, per Cairns, L.C., 3 App. Cas. 1236.]

It is at once apparent that the position of a first director of a company calls for, if possible, greater care, skill and intelligence than is required from subsequent members of the board. It is of the very first importance that the director should occupy a perfectly independent position, capable of exercising an impartial judgment and acting throughout in the interests of the company alone.

The project of a new company is, in most instances, brought before an intended director in a definite form, as being for the purpose of acquiring some special thing upon special terms already provisionally arranged. It is thus too common a practice for the average director to consider that the adoption of the contract for the acquisition of the property in question is a foregone conclusion. In this belief, he is too frequently accustomed to accept, without question, contracts upon which his independent judgment ought to have been carefully exercised. The director should remember that these contracts are provisional only, and in no sense binding on the company until finally adopted by the company, and that the responsibility of their adoption rests on the board, who should exercise due care in approving any such contracts.

It is competent with, and it is the duty of directors to insist that any such contract before its adoption, shall be modified or amended in any respects in which the directors may think it advisable in the interests of the company. It is even their duty to reject the contract altogether if they consider that in any respect its adoption is unadvisable.

It not unfrequently happens that on the formation of a company, the board of first directors is recruited by persons more or less interested in the property which the company is formed to acquire. Nothing can be more reprehensible than the position of a director who assumes to be both buyer and seller. [*James* v. *Eve*, 6. H.L. 335.]

The rule is "not a technical or arbitrary rule. It is a rule founded upon the highest and truest principles of morality. No man can, in this court, acting as agent, be allowed to put himself into a position in which his interest and his duty will conflict." [Lord Cairns, *Parker* v. *McKenna*, 10 Ch. 118.]

Where a contract is adopted on behalf of a company by a board of directors, who as mere nominees had no real power of exercising an independent judgment, the contract is voidable and will be set aside, even after a considerable lapse of time. [*Plympton Mining Company* v. *Wilkins*, 1882, W. N. 66.]

If, therefore, directors are bound to exercise their unfettered judgment for the benefit of the company, it follows, *a fortiori*, that they must not themselves be personally interested in the subject matter of the purchase.

The principle is well and firmly established that a person holding a fiduciary position with regard to a company, cannot obtain for himself a benefit derived from the investment of the property of the company in any matter in which he, the director, or other officer, as such may happen to be engaged.

Thus, in all cases where directors are personally pecuniarily interested in any property which the company may purchase, the company has a right either to rescind the contract, or at its option to hold the property it has purchased, and to pay no more for it than its agent or trustee himself paid. [*Tyrell* v. *Bank of London*, 10 H. L. C. 26.]

A person, who afterwards became a director of the company, made an arrangement with the promoters by which he was to receive a present of 1,000 B shares in the company in consideration of his taking or placing 500 A shares. Notice of this transaction had, after the formation of the company, been given to the directors, but the board which

received the notice consisted of persons more or less implicated in the transaction, and no action was taken in the matter. The company was afterwards wound up, and the liquidator took a summons out to recover from the director the value of 1,000 B shares, on the ground that his having received them was, under the circumstances, a misfeasance as against the company. It was contended that he was barred by the Statute of Limitations from making his claim, the company having, through its directors, received notice of the transaction more than six years previously. Held, that the director was guilty of misfeasance against the company in having received the B shares under the circumstances, and that the shares being now valueless, he must make good their value to the company as of the time he got them; and that, though notice to the directors was *primâ facie* notice to the company, yet when, as in this case, it was reasonably certain that the directors would not communicate the information to the shareholders, it was no notice, and the claim, therefore, was not barred under the Statute of Limitations. [*Re Fitzroy Steel Company*, 50 L. T. 144.]

The directors are a body to whom is delegated the duty of managing the general affairs of the company. A corporate body can only act by agents, and it is, of course, the duty of those agents so to act as best to promote the interests of the company whose affairs they are conducting. Such agents have a duty to discharge of a fiduciary nature towards their principal, and it is a rule of universal application that no one having such duties to discharge shall be allowed to enter into engagements in which he has or can have a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It is the bounden duty of a director to make the best bargain

he can for the benefit of the company. It makes no difference that the director is only one of a body; it is his duty to give his co-directors, and through them the company, the full benefit of all the knowledge and skill which he could bring to bear on the subject. He is bound to assist them in getting the articles contracted for at the cheapest possible rate, and he must not put his interest in conflict with his duty. [*Aberdeen Railway Company* v. *Blaikie*, 1 Macq. 471.]

Most prospectuses contain a statement to the effect that if no allotment of shares takes place the deposit made on application will be returned in full.

In *Moseley* v. *Cressey's Co.* [1 Eq. 405], where several deposits were made but no allotment ever took place, it was held that this statement did not 'bind' moneys, consisting mainly of these deposits, standing in a bank to the credit of the company, with a trust or lien in favour of the depositors as against creditors of the company.

But in the case of an abortive company where the deposit was returnable in full it was held that the managing committee had no right to expend any portion of the deposits they received in the payment of preliminary expenses in the absence of a contract. [*Walstab* v. *Spottiswoode*, 15 M. & W. 501; *Nockels* v. *Crosby*, 3 B. & Cr. 814.]

The decisions in these cases rest upon the general principle that the persons who set a scheme on foot must, in the first instance, bear all the expenses before the scheme is in actual operation. When it is in operation, then it is fair that the preliminary expenses should be borne by the company, for then the shareholders have the benefit of those expenses. If there are no subscribers, then obviously the expenses fall upon the promoters; and if only one person subscribes, it would be obviously inequitable that the expenses of the abortive company should fall on him.

Many companies issue prospectuses and receive applica-

tions for shares prior to incorporation. It is therefore very material to consider the position and liability of promoters, provisional committees, and others individually, for the preliminary expenses. This has been clearly defined by Parke, B., in his judgment in *Bright* v. *Hutton*. [3 H. L. C. 341.]

"In the case of provisional committees, or the projectors of a company, it is now perfectly well settled law that there is no partnership between them, no common power of binding each other merely by such a relation, each binds himself by his own acts only. There are therefore very few creditors of such a body collectively, though many of one, two, three, or more acting individuals who compose the committee, or are projectors, and so there may be a series of contracts to which there are different contributories, according as they have been authorised by different persons, very few binding all, and those only upon the rare accident of each individual authorising that particular contract."

But where persons meet together for the purpose of forming a company, and hold meetings preliminary to its formation, the attendance of any one of such persons at such meetings is some evidence to go to a jury to fix him with the liability for expenses necessarily incurred on the order of other members of the company. [*Lake* v. *Duke of Argyll*, 14 L. J. Q. B. 73; *Wood* v. *Duke of Argyll*, 13 L. J. C. P. 96.]

It is not sufficient to oust the liability of the persons associated with the promoter for the preliminary expenses that the promoter has agreed to bear all the expenses, unless that fact be communicated to the person giving credit. Thus, where provisional directors authorised by resolution the printing of a prospectus of an intended company, and initialed a draft thereof, it was held that there was evidence from which the jury might infer that the promoter was authorised by the directors to pledge their credit for the printing. [*Riley* v.

Pakington, 2 C. P. 536; *Maddick* v. *Marshall*, 11 L. T. 611.]

Where a contract is signed by one who professes to be signing as agent, but who has no principal existing at the time, and the contract would thus be wholly inoperative unless binding upon the person who signed it, he is personally liable on it, and a stranger cannot by a subsequent ratification relieve him from that liability.

Thus, where before the registration of a limited company an order for the advertisement of the prospectus was given by a person who signed it, and added the words "secretary pro tem.," and the proprietor of the paper in which the advertisement appeared brought an action for the cost, it was held, that the secretary was personally liable, as he claimed to be the agent of a non-existing principal, and that the liability must therefore rest upon the only person appearing in the transaction. [*Hopcroft* v. *Parker*, 16 L. T. 561; *Kelner* v. *Baxter*, 2 C. P. 174.]

Every person who enters into a contract on behalf of a non-existing company, whilst thereby precluding himself from obtaining for himself the benefit of the contract, renders himself at the same time personally liable for its fulfilment.

When the company springs into existence, it can, if it chooses, adopt the contract; but it can only do so with the assent of both the original parties to the contract. The effect of the adoption is to make the company liable on the contract as from the date of the adoption, and at the same time discharges from all personal liability the person who contracted on its behalf.

A company can never ratify any contract entered into on its behalf before it came into existence. Ratification can only be by a person ascertained at the time of the act done,—by a person in existence either actually or in contemplation

of law. In all cases where a person acting as agent for another professes, though without authority, to contract for him, the maxim "Omnis ratihabitio retrotrahitur et mandato priori æquiparatur" applies; the subsequent assent or recognition by the party for whom the agent professes to act being equivalent to a previous authority.

Thus, where promoters of a projected company entered into contracts on its behalf, which on its incorporation the company ratified, it was held that the promoters were, nevertheless, personally liable thereon, as the company could not ratify a contract entered into when it was non-existent. [*Kelner* v. *Baxter*, 2 C. P. 174: *Scott* v. *Lord Ebury*, 2 C. P. 255.]

It must not be forgotten that an existing company can ratify all contracts entered into by its agents on its behalf; and that those agents, whilst acting within the scope of their authority, incur no personal responsibility for any such contracts.

CHAPTER V.

THE PROSPECTUS.

THE company having assumed a definite shape and become ready for launching, whether actually incorporated or not, its first public act is usually an appeal to the public for subscribers to the share list, through the medium of what is termed a prospectus.

Of late years actions against individual directors of companies for fraudulent misrepresentation in statements contained in prospectuses have been of lamentable frequency. Experience of the risk run in making reckless statements has probably conduced to a more cautious method of wording prospectuses, but observation of the advertising columns of our daily papers shows that the art of highly coloring prospectuses is by no means dead.

The real author of the prospectus very seldom appears, and it may be safely assumed that in hardly one single instance has the person who has been fixed with the responsibility of its statements been the one who drafted it. It is too much the custom of directors to accept the prospectus as a matter of course, taking for granted statements of the highest importance, of the truth or falsehood of which they are themselves ignorant. In most instances of fraudulent prospectuses the directors have suffered through their own gross recklessness, whilst innocent of intentional misstatement.

All persons, whether officers of the company or not, concerned in authorising the issue of a prospectus are

responsible for the truth of the statements therein contained.

Every company which appeals to the public for subscription to its share capital has of necessity to issue a prospectus of some kind or another. The proper office of a prospectus is to invite persons to become original partners in a company, that is to say, allottees of shares. The usual form of prospectus is too well known to need description here. The form generally adopted is that which expediency suggests as the most convenient, and as being the clearest and most comprehensive. The prospectus, however, may take any form desired.

Of the component parts of a prospectus only one is a statutory requisite—that relating to contracts, which will be dealt with in the next chapter.

It is almost superfluous to state that the inducements held out in the prospectus must be founded on well-ascertained facts. For a prospectus to contain a highly-colored picture of anticipated profits founded on the sanguine expectations of the promoters, is not in itself delusive, as no prudent man will accept the prospects which are always held out by the originators of every new scheme, without considerable abatement; [*Denton* v. *Macneill*, 2 Eq., 352], but any misrepresentation of material facts will entitle the shareholder subscribing on faith of the prospectus to recission of his contract with the company, and to have a return of his money.

It cannot be too frequently or too strongly impressed upon those who, having projected any undertaking are desirous of obtaining the co-operation of persons who have no other information on the subject than that which the promoters and directors choose to convey, that the utmost candour and honesty ought to characterise their published statements. [*Central Railway of Venezuela* v. *Kisch*, 2 H. L. 99.]

A prospectus being addressed to the whole public, any one may take up the prospectus and appropriate to himself its representations by applying for an allotment of shares. Mere non-disclosure of facts, however morally censurable, however that non-disclosure might be a ground for setting aside an allotment of shares, unless such non-disclosure has the effect of making the disclosed facts, from their partial and fragmentary nature, absolutely false, will not be sufficient to sustain an action for misrepresentation. [*Peek* v. *Gurney*, 13 Eq. 79; 6 H. L. 377.]

Misrepresentation entitles the shareholder subscribing on faith of the prospectus not only to rescission of his contract as against the company, but also to an action for deceit against the directors, promoters and other persons issuing the prospectus, to recover any damage he may have sustained thereby.

An action for deceit, however, will not lie against the executors of a deceased director if his estate derived no benefit from the misrepresentation to which he was a party. [*Peek* v. *Gurney*, 6 H. L. 377; *Hambly* v. *Trott*, Cowp. 376.]

A director is not liable for a fraud (such as the issue of a fraudulent prospectus of the company) committed by his co-directors, or by any other officer or agent of the company, unless he has either expressly authorised or tacitly permitted its commission. [*Cargill* v. *Bower*, 10 Ch. D. 502; *Weir* v. *Barnett*, 3 Ex. D. 32.]

Those persons, and those only, who put out the particular documents are responsible for them. Of course, the company is responsible so far as the documents were put out in the ordinary course of the business of the company. It is not every misrepresentation which, though sufficiently material to entitle the shareholder to a rescission of his contract as against the company, will ground an action for deceit against the directors or promoters personally.

In an action against a company for setting aside a contract which has been obtained by misrepresentation the plaintiff may succeed although the misrepresentation may have been innocently made. But in an action for deceit, against directors or promoters, the misrepresentation to found the action must not be innocent,—that is to say, it must be made either with knowledge of its being false, or with a reckless disregard as to whether it is or is not true. [*Arkwright* v. *Newbold*, 17 Ch. D. 301.]

If a director or promoter who is responsible for the statements contained in the prospectus makes every reasonable inquiry and *bonâ fide* believes in the truth of the statements made by the prospectus he is not liable though those statements afterwards prove false. [*Smith* v. *Chadwick*, 20 Ch. D. 27.]

It would also appear that persons issuing a prospectus are not liable to an action of deceit (as these actions against directors are termed) because they do not mention a fact coming to their knowledge after the issue of the prospectus and before the actual allotment of shares, which falsifies a statement in the prospectus. [*Arkwright* v. *Newbold*, 17 Ch. D. 301.]

Where a person applied for shares on the faith of a representation contained in a prospectus, which, though false at the date of the issue of the prospectus, had become true prior to his application, he was held not entitled to recover as for fraudulent misrepresentation. In the particular case referred to the prospectus contained a statement to the effect that "more than half of the capital" was subscribed for. This statement at the time of the issue of the prospectus was false. At the time when the plaintiff applied for shares, not only were there more than half the shares subscribed for, but the whole of the shares had been subscribed for, and many persons had been refused shares. It was held that the

plaintiff was not misled or deceived in any way. [*Ship* v. *Crosskill*, 10 Eq. 73.]

It should be remembered that the decision in this particular case depends upon its very special circumstances. A distinct representation that a certain number of shares has been subscribed for, is a highly material allegation and one for the truth of which the persons issuing the prospectus will be held responsible. [*Ross* v. *Estates Investment Company*, 3 Eq. 122; 6 Ch. 682; *Henderson* v. *Lacon*, 5 Eq. 249.]

It is a rule of law that if persons take upon themselves to make assertions as to which they are ignorant, whether they are true or untrue, they must, in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue. [*Reese River Silver Mining Company* v. *Smith*, 4 H. L. 64.]

If, therefore, in a prospectus, directors or promoters take upon themselves to assert positively and in distinct terms certain things, it is not afterwards competent for them to say that the applicant for shares must have known that they knew nothing of the truth or falsity of these various allegations. The applicant is entitled to say: "I assumed that you as men of character and honour knew to be true that which you stated, and now I find that not one word which you stated is true." [*Reese River Silver Mining Company* v. *Smith*, 4 H. L. 72.]

If the directors choose to act upon representations made to them by their agent, who is generally the promoter of the company, they must be fixed with all the consequences of the transaction just as if they themselves had borne a part in it. [*Ross* v. *Estates Investment Company*, 3 Eq. 122.]

Those who issue a prospectus holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take

shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as a fact that which is not so, but to omit no one fact within their knowledge, the existence of which might in any degree affect the nature or extent or quality of the privileges and advantages which the prospectus holds out as inducements to take shares. [*New Brunswick and Canada Railway* v. *Muggeridge*, 1 Dr. & Sm. 381.]

When the unexpected calamity happens, a director cannot be allowed to say, "I knew the fact well, but I did not consider it of any moment." The Court must judge for itself whether it was of moment or not, and will impute to each director that knowledge which, if he did not possess, he ought to have possessed, and will visit him with the consequences naturally flowing from it. [*Peek* v. *Gurney*, 13 Eq. 111.]

An applicant for shares is entitled to rely implicitly upon the statements contained in the prospectus, and is in no way bound to inquire for himself into the truth of the facts alleged. When once it is established that there has been any fraudulent misrepresentation or wilful concealment by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper inquiry. He has a right to retort upon his objector, "You, at least, who have stated what is untrue, or have concealed the truth, for the purpose of drawing me into a contract, cannot accuse me of want of caution, because I relied implicitly upon your fairness and honesty." [*Central Railway of Venezuela* v. *Kisch*, 2 H. L. 99.]

A comprehensive summary of the law upon the liability of directors and promoters for statements contained in a prospectus will be found in the judgment of Jessel, M. R., in

Smith v. *Chadwick* [20 Ch. D. 44], which decision has been confirmed in the House of Lords :—

"I think the law on this subject is clear. A man may issue a prospectus or make any other statement to induce another to enter into a contract, believing that his statement is true and not intending to deceive; but he may, through carelessness, have made statements which are not true, and which he ought to have known were not true, and if he does so he is liable in an action for deceit. He cannot be allowed to escape merely because he had good intentions and did not intend to defraud. Again, on the question of the materiality of the statement, if the Court sees on the face of it that it is of such a nature as would induce a person to enter into the contract, or would tend to induce him to do so, or that it would be a part of the inducement to enter into the contract, the inference is, if he entered into the contract, that he acted on the inducement so held out, and you want no evidence that he did so act; but even then you may show that in fact he did not so act, in one of two ways, either by showing that he knew the truth before he entered into the contract, and therefore could not rely on the mis-statements, or else by showing that he avowedly did not rely upon them, whether he knew the facts or not. He may by contract have bound himself not to rely upon them, that is, to take the matter at his own risk, whether they were true or false (which was the conclusion to which the House of Lords came in the recent case of *Brownlie* v. *Campbell* [5 App. Cas. 925]), or he may state that he did not rely upon them in the witness-box. But unless it is shown in one way or the other that he did not rely on the statement, the inference follows.

"We now come to another class of cases, in which it is not obvious to the Court that the statement is material; and there may be several ways in which it may not be obvious. In the first place the statement may be ambiguous; it may

have one of two meanings, and the Court cannot decide which meaning it has. In that case the plaintiff must tell us what he relied on. It is for him to say, 'I relied on the statement in this meaning, that is the meaning I took; if it is ambiguous it is the fault of the defendant, and relying on that I entered into the contract.' But if the plaintiff will not tell us what he relied on, if he says to the Court, 'Please to find out the meaning; I relied on the statements in the prospectus, and I relied upon them according to their meaning, whatever that meaning is,' surely that will not not do. How can the Court find out that he has been deceived at all? The Court may think it means the very thing the plaintiff did not think it meant, and then are they to say he has been deceived because he took it in the wrong sense? That of course is impossible.

"Again, in an action of deceit, even though the statement may be untrue, yet if it was made in good faith and the defendant had reasonable ground for believing it to be true, the defendant will succeed.

"Finally, it is not every mis-statement, although untrue, and although untrue in a sense to the defendant's knowledge, that will do. It may be that the mis-statement is trivial, so trivial as that the Court will be of opinion that it could not have affected the plaintiff's mind at all, or induced him to enter into the contract; or it may be that although the means of knowledge were in the hands of the defendant, yet the matter was minute and required a careful examination, and there may have been reasonable grounds for the defendant to believe that this statement was true, although he had those means of knowledge in his possession. In that way also, he would be entitled to succeed. . . . .

"I have arrived at the conclusion that the defendants were honest men . . . That, in my opinion, has a material bearing in construing the documents, because if you once

arrive at the conviction that the persons who made the representation intended to act honestly, I think if you have any doubt or hesitation as to the meaning of the terms, the rule prevails that you presume things were done rightly."

It is therefore very material to observe that if in an action against directors or promoters for deceit it is proved that the plaintiff did not rely upon the false statement complained of, he cannot maintain the action.

A mis-statement of the valuation of the property of a company to the amount of £3,000 out of £301,000 has been held, from its trivial nature, not to be a material mis-statement. [*Smith* v. *Chadwick*, 20 Ch. D. 27.]

Where purchase-money was to be paid by instalments and no mention made in the prospectus of interest being payable, *held* not a material misrepresentation. [*Smith* v. *Chadwick*, 20 Ch. D. 27.]

Where the promoters of a company fraudulently declared by their prospectus that they did not hesitate to guarantee a minimum annual dividend of 33 per cent. on the shares, it was held that a shareholder who had relied on the false representation was entitled to recover against the promoters damages in respect of the loss he had so incurred. [*Gerhard* v. *Bates*, 22 L. J. Q. B. 365; *Taylor* v. *Ashton*, 12 L. J. Ex. 363.]

In all actions founded on a prospectus, directors and promoters can be rendered personally liable to the aggrieved shareholders in one of two ways; either in an action for deceit, founded on misrepresentations contained in the prospectus, or in an action founded on the omission to set out in the prospectus the contracts directed to be disclosed by Section 38 of the Companies' Act, 1867, which is treated of in the next chapter.

An action for misrepresentation will entitle the shareholder to recover damages against the directors, and at the

same time be a ground for him to seek to have his name removed from the share register of the company and to have a return of his money.

An action founded on the non-compliance with the terms of Section 38 gives the shareholder no right against the company, but only against the "promoters, directors, or trustees thereof."

In an action for deceit founded on a fraudulent prospectus it has been laid down by Campbell, L.C., that the proper mode of measuring the damages is to ascertain the difference between the purchase-money and what would have been a fair price to be paid for the shares in the circumstances of the company at the time of purchase. [*Davidson* v. *Tulloch*, 3 Macq. 783.]

It is now a well-recognised principle that in an action of this description the plaintiff can only recover the difference between the value represented and the real value at the time he bought. [*Arkwright* v. *Newbold*, 17 Ch. D. 301.]

If by the fraud an allottee has lost the full amount of his shares, he is entitled to recover all the money he has paid. [*Twycross* v. *Grant*, 2 C. P. D. 469.]

When the allotment of shares is complete the office of the prospectus is exhausted. A purchaser of shares in the market cannot recover against those who issued the prospectus any losses he may incur through his purchase. In actions by subsequent purchasers it is necessary to make out some direct connection between the directors and the party who alleges that he was deceived. The original allottees alone are entitled to rely upon the false representations contained in a prospectus for rescission of their contract with the company and for damages against the promoters. [*Peek* v. *Gurney*, 13 Eq. 79; 6 H. L. 377.]

To obtain rescission of contract on the ground of misrepresentation the allottee must not be guilty of laches. Delay

will be fatal to his claim so far as the company is concerned. To entitle him to the assistance of the Court he must act promptly; the rule established by decisions being that a longer delay than three months after discovery by the allottee of the fraud forfeits his right to relief against the company. [*Heyman* v. *European Railway Company*, 7 Eq. 154.]

If a prospectus states that the articles of association may be seen at a certain place, a person taking shares on the faith of the prospectus and without inspecting the articles must be held to do so with notice of the contents of such articles, provided they do not contain anything incompatible with the prospectus. [*Ex parte Briggs*, 1 Eq. 483; *Central Venezuela Railway Company* v. *Kisch*, 2 H. L. 99.]

A statement in the prospectus that no further calls are contemplated does not affect the power of the company to make further calls, and affords no defence to an action for those calls. [*Accidental Insurance Company* v. *Davis*, 15 L. T. 182.]

Delay is no answer to an action against directors and promoters personally for deceit. [*Peek* v. *Gurney*, 13 Eq. 79; 6 H. L. 377; *Downes* v. *Shipp*, 3 H. L. 343.]

In most cases of unsuccessful companies there are to be found allottees anxious to obtain rescission of their contracts in order to avoid further liability, who attempt to repudiate their shares generally on insufficient and often even on imaginary grounds.

To such cases the words of Turner, L.J., in *Jennings* v. *Broughton* [22 L. J. Ch. 585] well apply: "And, finally, though I think that although it is the undoubted duty of this Court to relieve persons who have been deceived by false representations, it is equally the duty of this Court to be careful that in its anxiety to correct frauds it does not enable persons who have joined with others in speculations to convert their speculations into certainties at the expense of those with whom they have joined."

CHAPTER VI.

CONTRACTS IN A PROSPECTUS.

By Sect. 38 of the Companies Act, 1867, it is enacted:

"Every prospectus of a company and every notice inviting persons to subscribe for shares in any joint stock company shall specify the dates and the names of the parties to any contract entered into by the company or the promoters, directors, or trustees thereof, before the issue of such prospectus or notice, whether subject to adoption by the directors or the company, or otherwise; and any prospectus or notice not specifying the same shall be deemed fraudulent on the part of the promoters, directors and officers of the company knowingly issuing the same as regards any person taking shares in the company on the faith of such prospectus unless he shall have had notice of such contract."

This section applies only to a share prospectus, and does not apply, therefore, to prospectuses inviting subscriptions for bonds or debentures of a company. [*Cornell* v. *Hay*, 8 C. P. 328.]

The non-disclosure of a contract in a share prospectus does not entitle the allottee to rescission of his contract, but gives him a remedy against the offending promoters, directors and officers of the company personally for any loss he may have sustained. [*Gover's Case*, 20 Eq. 114; 1 Ch. D. 182.]

It may be inferred that the words of the section were purposely left as general as possible in order to throw as wide a protection as possible over those for whose benefit the Act was passed. It is not necessary to attempt to do what the Legislature has refused to do—viz., to define positively

and negatively the exact kind of contract which must be disclosed and the exact kind of contract which need not. Suffice it to say, that any construction of the section which would exclude from its operation a contract entered into by a promoter before its prospectus was published, and affecting his own payment out of the funds of the company, or the property of the company, or the manipulation of its shares, or the independence of its directors, would be too narrow a construction and ought not to be adopted.

If it had been the intention of the Legislature to confine the effect of the enactment to contracts by which either a benefit is secured to or an obligation or burden is imposed upon a nascent company, nothing would have been easier than to say so in distinct terms. But any such limitation appears to be much too arbitrary and narrow and unwarranted by the language of the section. A contract which imposed a burden on the company would admittedly come within the section. But what difference is there in principle between a contract which takes money from the company's funds by an obligation directly binding the company, and one which saps those funds through a clandestine contract with a contractor or promoter? The one form of proceeding is, no doubt, more subtle and insidious than the other, but it is not the less prejudicial to the interest of the company or less essential to be made known to those who are invited to join it. The statute was intended to strike at any such surreptitious transactions. [*Twycross* v. *Grant*, 2 C.P.D. 469.]

Though it has no very definite meaning, the term "promoter" involves the idea of exertion for the purpose of getting up and starting a company (or what is called "floating it") and also the idea of some duty towards the company imposed by or arising from the position which the so-called promoter assumes towards it. [*Emma Mining Company* v. *Lewis*, 4 C. P. D. 396.]

A promoter is one who undertakes to form a company with reference to a given project and to set it going, and who takes the necessary steps to accomplish that purpose. [*Twycross* v. *Grant*, 2 C. P. D. 469.]

A promoter occupies a fiduciary position towards the company and has duties towards it even before the company comes into existence. [*Bagnall* v. *Carlton*, 6 Ch. D. 371; *Erlanger* v. *New Sombrero Company*, 3 App. Cas. 1218.]

He is bound to protect its interests and those of the shareholders. He should conceal nothing from them which it is essential for them to know. If he proposes to appropriate to himself any part of their funds as a reward for his services, or to derive advantage by selling to them at a profit, any contracts by which effect has been given to such purposes, come within the protective enactment of Section 38.

Thus where a promoter agreed with the vendors to the company that he should receive a secret profit out of the purchase moneys, he was held liable to refund all sums so received by him. As he occupied a fiduciary position towards the company this debt amounted to a breach of trust and was not barred by his bankruptcy. [*Emma Mining Company* v. *Grant*, 17 Ch. D. 122.]

So also where promoters purchased a property for £1,000 and resold it to a company, the directors of which were mere nominees having no option of forming a separate judgment, for £4,500, it was held that the promoters occupied a fiduciary position to the shareholders, and therefore the transaction was three years afterwards set aside and the promoters ordered to repay to the company jointly and severally all profits they had received. [*Plympton Mining Company* v. *Wilkins*, 1882, W.N. 66.]

The "issue" of a prospectus means the making the prospectus public after its adoption, with a view to inviting persons to take shares and become members of the company.

This must be taken to refer to an official publication authorised by those who at the time have the government of the company, otherwise it would not be the prospectus of the company. So authorised, the publication, by whomsoever actually carried into execution, would be the act of the company, on the principle that the authorised act of an agent is always the act of the principal; but the act, though done by the authority of a principal and in that sense the act of the principal, remains none the less in point of fact the act of the agent, and, if wrongful, makes the agent liable for its consequences. [*Twycross* v. *Grant*, 2 C. P. D. 540.]

"Knowingly issue" means issuing a prospectus with the knowledge of the existence of contracts which are by sect. 38 required to be specified, and the intentional omission of them from the prospectus, even although they are omitted under the *bonâ fide* belief that it is unnecessary to specify them. Ignorance or mistake of the law cannot be admitted as an excuse for disobeying an Act of Parliament. [*Twycross* v. *Grant*, 2 C. P. D. 469.]

The words of the section "any contract entered into" ought to be held to extend to every contract made with a person who afterwards becomes a promoter or director, provided the company have become entitled to the benefit of the contract, or have become liable to perform the provisions of the contract before the prospectus was issued. [Mellish, L. J., *Gover's Case*, 1 Ch. D. 191.]

It is difficult to place a limitation upon the words of the section and define absolutely how far sub-contracts must be specified in a prospectus.

All contracts would appear to be within the section which would directly or indirectly affect the affairs of the company when formed and the knowledge of which might reasonably be expected to influence an applicant for shares. [*Twycross* v. *Grant*, 2 C. P. D. 469.]

Thus where the profit for the promoter is added to the purchase money of a business, the disposal of such profit must be specified in the prospectus. It would seem that a mere vague expectation or understanding, so long as it has not actually ripened into a definite agreement, is not a contract within the meaning of the section, and that the language of the enactment will not be extended to include general negotiations of this nature. [*Arkwright* v. *Newbold*, 17 Ch. D. 301.]

In *Sullivan* v. *Metcalfe* [5 C. P. D. 455] a patent had been sold to a company for £56,000, though out of this sum the vendors retained only £2,000, the remaining £54,000 being by a series of sub-contracts paid to the promoters. It was held that these contracts should have been specified in the prospectus.

There is no necessity to give the details or even the substance of the different contracts. [*Twycross* v. *Grant*, 2 C. P. D. 469.] The section is satisfied if they are clearly specified in the prospectus, and it is usual to mention some place where they can be inspected by any intending investor. Any such inspection is, however, purely optional.

Although the unanimous judgment of Lord Coleridge, C. J., and Grove and Lindley, J.J., in the action *Twycross* v. *Grant* was upheld, the judges of the Court of Appeal were equally divided. Cockburn, C. J., and Brett, L. J., agreeing with the Court below, and Bramwell, L. J., with Kelly, C. B., dissenting; their opinion being based on the principle that, it being necessary to put some limitation on the very wide words of the section, such limitation should be that the section applies as to those contracts only which affect the company, which put an obligation upon it, whether with or without some benefit attached. Sub-contracts which provide for the distribution of the purchase money amongst the vendors and promoters do not come

within this definition. The company knows the utmost price it has to pay for the property it acquires, and consequently it is for the company to judge in the first instance as to the propriety of purchasing at the price fixed. Once it has agreed to purchase at that price, the subsequent division of that purchase money amongst the vendors and promoters can in no way affect the company. Such subdivision renders the company not a penny the poorer, nor does it in any shape impose any obligation upon it. That the disclosure of such sub-contracts in the prospectus is greatly to the advantage of intending investors is undeniable, but the question remains whether the section compels them to be set out in the prospectus. The question was again discussed in the Court of Appeal in an action *Sullivan* v. *Metcalfe* [5 C. P. D. 455], when Bramwell, L. J., expressly retained his former opinion, being, however, overruled by Thesiger and Baggallay, L.J.J. As the result of the cases it appears that these sub-contracts must be set out in the prospectus.

In cases where a company is formed to carry on a going concern it is often found impracticable to attempt to satisfy the section. It is therefore usual to insert in the prospectus a clause to the effect that subscribers must be taken to have waived compliance with this section.

In the absence of decided cases as to what sub-contracts must be specified, it is always prudent to insert in the prospectus a clause relating to the minor contracts for printing, advertising, clerks, offices, and the like. [*Twycross* v. *Grant*, 2 C. P. D. 498, 531.]

The following is suggested as a form:—

"As the vendors [and promoters] have been carrying on the business since the day of last contracts are current and other engagements have necessarily been entered into in connection therewith: they cannot, however, be fully

specified in this prospectus. The vendors and promoters have also entered into engagements with solicitors, brokers, advertising agents, printers, and others, none of which impose on the company any liability beyond the obligations contained in the before-mentioned contract for preliminary expenses; and have also entered into engagements on behalf of the company with secretary and clerks, and for offices in the ordinary course of business. Applicants for shares must be taken to have waived further particulars and to have received the notice required by sect. 38 of the Companies Act, 1867, in respect of all contracts referred to in this paragraph."

It is, however, very questionable whether any such stipulation is of any use. The Act of Parliament is imperative: "any prospectus not specifying the contracts shall be deemed faudulent." It is difficult to see how a fraud can be effectually waived.

Lastly, it may be noted that where it is intended to apply to the London Stock Exchange to quote the shares of a company in its official list, the following requirements have to be complied with :—

The memorandum of association must be printed *in extenso* on the prospectus.

The articles of the company must prohibit any dealings by the company in its own shares.

The paid-up capital must not be less than £50,000.

The shares must be offered to the public.

Upwards of two-thirds of the issue must be *bonâ fide* subscribed by the public.

The company must be represented by a member of the London Stock Exchange, who is responsible to the committee for the respectability of the company.

CHAPTER VII.

SHARES.

EVERY share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash unless the same shall have been otherwise determined by a contract duly made in writing and [the original] filed with the registrar of joint stock companies at or before the issue of such shares. [C. A. 1867, s. 25.]

The issue of the shares of a company is usually the result of applications received from members of the public through the medium of the prospectus.

The directors of the company accept the application, if approved, by an allotment of shares.

The fact of the allotment must be communicated to the allottee either by a letter of allotment or verbally. [*Gunn's Case*, 3 Ch. 40.]

The allotment of shares must be an unqualified acceptance of the application, and the fact of the allotment must in some manner, directly or indirectly, be brought to the knowledge of the allottee.

It is not competent with directors, unless expressly authorised to do so, to delegate to third persons their power of allotting shares. Thus where the power of allotting shares was by the articles vested in the board, and they by resolution delegated this power to two of the directors and the manager, it was held that as the company had vested this power only in the board the allotment was bad. [*Howard's Case*, 1 Ch. 561.]

By the articles of a company it was provided that the number of directors should not be less than four, of whom two should be a quorum; and that the continuing directors might act notwithstanding any vacancy in the board. The articles named the first four directors; two of these resigned before any allotment took place; the two remaining proceeded to allot shares. It was held that although there was not a board of directors, the quorum of two was competent to allot shares. [*In re Scottish Petroleum Company*, 23 Ch. D. 413.]

It is a breach of duty for a director to take a part in having shares allotted to infants. Thus where a director knowingly allowed shares to be allotted to infants he was held liable for the amount of the calls due by them, which owing to their infancy could not be recovered against them. [*Ex parte Wilson*, 8 Eq. 240.]

The right of directors to refuse to register transfers of shares is regulated by the articles, which usually contain powers to the directors to decline to permit transfers of shares by persons who are indebted to the company; and the right of lien on those shares which the articles usually confer upon the company can be enforced to its fullest extent. [*Ex parte Stringer*, 9 Q. B. D. 436; *New London and Brazilian Bank* v. *Brocklebank*, 21 Ch. D. 302.]

The directors of a company have no discretionary power, independently of powers expressly given to them by the articles of association, to refuse to register a transfer which has been *bonâ fide* made.

Thus where a transferee gave an address at which he was only an occasional visitor, it was held that the directors, in the absence of discretionary powers, were bound to register the transfer, although the company was at the time in difficulties and the shares were sold by the transferor in order to get rid of his liability. [*Weston's Case*, 4 Ch. 20.]

Many articles make the transfer of shares subject to the approval of the directors.

Where this approval is required the Court cannot dispense with the directions of the articles, and where such approval has not been obtained will not direct a transferee's name to be entered on the register. [*Walker's Case*, 2 Eq. 554.]

Where the transferee is subject to the approval of the directors, this power of approving must be exercised reasonably and will be controlled by the Court. [*Robinson* v. *Chartered Bank*, 1 Eq. 32; *Slee* v. *International Bank*, 17 L. T. 425.]

But it has been held that the directors were not bound to disclose their reasons for rejecting a transferee, provided they had fairly considered the question at a board meeting, and in the absence of evidence that the directors had exercised their powers of rejection capriciously and unfairly the Court would take it for granted that they had acted reasonably and *bonâ fide*. [*Ex parte Penny*, 8 Ch. 446.]

Where the articles gave the directors no discretionary powers, and where the votes diminished in proportion to the increased number of shares, and a shareholder subdivided his holding amongst nominees for the purpose of increasing his number of votes at one particular general meeting, but the directors refused to register the transfers, the company was ordered on motion under the 35th section of the Act, 1862, to register the transfers in time to enable the transferees to vote at the meeting. [*Re Stanton Iron Company*, 16 Eq. 559.]

Where the directors have discretionary powers under the articles of rejecting a transferee, and their approval is obtained by fraudulent misrepresentation, it has been held that such mis-statements, which were intended to mislead and did mislead the directors, avoided the transaction. [*Payne's Case*, 9 Eq. 223.]

To invalidate the transfer the misrepresentation must be fraudulent; misdescription not intended to mislead, even although it has that result, will not invalidate it.

Thus the misdescription of a journeyman butcher as a "gentleman" in a *bonâ fide* transfer was held not material. [*Master's Case*, 7 Ch. 292.]

Likewise where a transferee similarly described was a person of no means. [*Bishop's Case*, 7 Ch. 296, n.]

With respect to the holdings of married women in any company, the Married Women's Property Act, 1882, seems to imply that if the articles contain no restriction against the admission of a married woman to hold shares, and confer no general discretionary power upon the directors, the company will be bound to accept a married woman as a shareholder.

The fact that any share, stock, debentures, debenture stock, or other interests of or in any corporation, company, public body, or society may be standing in the sole name of a married woman, is sufficient *primâ facie* evidence that she is beneficially entitled thereto for her separate use, so as to authorise and empower her to receive or transfer the same and to receive the dividends, interests, and profits thereof without the concurrence of her husband, and to indemnify all directors, managers and trustees of every such corporation, company, public body, or society as aforesaid, in respect thereof.

It is entirely optional with the directors to register shares in the name of an infant transferee, but if they do so with knowledge of his infancy they commit a breach of duty if the shares are not fully paid up, and they release the liability of the transferor; otherwise the transferor remains liable for calls on any shares he may transfer to a minor. [*Curtis' Case*, 6 Eq. 455; *Capper's Case*, 3 Ch. 458.]

Unless the articles prescribe any particular form of trans-

fer, the directors may accept transfers in any sufficient form ; and in the absence of directions in the articles it is a matter entirely within the discretion of the directors whether a transfer of shares can or cannot be made without the production of the share certificate. [*Shropshire Railway Company* v. *The Queen*, 8 Q.B. 420 ; 7 H. L. 496.]

If the articles prescribe any formalities previous to a transfer, the directors have no discretion to dispense with them. [*Murray* v. *Bush*, 6 H. L. 37.]

The power of making calls upon the shareholders up to the amount unpaid on their shares is usually entrusted to the board. This power, like all other powers entrusted to them, must be exercised by the directors for the benefit of the company, and not with any ulterior motives. If directors exercise their powers oppressively they will be restrained by the court. [*Cannon* v. *Trask*, 20 Eq. 669.]

If directors make a call upon shareholders with the improper motive of disqualifying certain members from voting at a general meeting, by reason of the inability of those members to pay their calls, they will be restrained. [*Anglo-Universal Bank* v. *Baragnon*, 45 L. T. 362.]

A call to be valid must be made by a board of directors properly appointed. [*Garden Gully Company* v. *McLister*, 1 App. Cas. 39.]

Where the articles stipulate that the number of directors must not be less than a certain number, the interests of the shareholders require that there should be that number. Consequently a call made by directors when the board has fallen below the prescribed number is invalid. [*Alma Spinning Company*, 16 Ch. D. 681.]

But a call made at a meeting at which there was not a proper quorum of directors, and which was subsequently confirmed when a proper quorum was present, was held good. [*Phosphate of Lime Company*, 24 L. T 932.]

A director who is himself a party to making an invalid call or allotment cannot be heard to raise any objection to the validity of his own action and take advantage of a defect of which he had notice at the time of the transaction. [*York Tramways* v. *Willows*, 8 Q. B. D. 685.]

Calls must be made alike on all shares of each particular class, so that no one shareholder may have to pay proportionally more than any other shareholder. But if the articles permit it, the directors may make arrangements on the issue of shares for a difference between the holders of such shares in the amount of calls to be paid, and in the time of payment of such calls. They may also, if the articles allow, accept from any member of the company who assents thereto, the whole or a part of the amount remaining unpaid on any share or shares held by him, either in discharge of the amount of a call payable in respect of any other share or shares held by him, or without any call having been made. [C. A. 1867, sec. 24.]

It would seem that directors have no power to compound with members for calls. The shares of the company are issued subject to the payment of the whole amount thereof in cash, and in the event of non-payment of calls it would seem that the proper course for directors to pursue is to proceed to forfeit the shares.

But a forfeiture to be valid must be made by a properly appointed and constituted board, and all provisions in the articles respecting forfeiture must be strictly complied with. [*Garden Gully Company* v. *McLister*, 1 App. Cas. 39; *Alma Spinning Company*, 16 Ch. D. 681.]

Directors can sell at a discount, without any registered contract as required by Section 25 of the Companies Act, 1867, shares which have been forfeited for non-payment of calls. [*Ramwell's Case*, 50 L. J. Ch. 827.]

It is conceived that shares which have lapsed to the

company by disclaimer, under Section 55 of the Bankruptcy Act, 1883, or by surrender to the company, can be similarly treated.

It appears doubtful whether by registration of a contract in writing under Section 25, a company can issue shares as paid up without receiving any consideration therefor, or can by this means issue its original capital at a discount. [*Gold Company*, 11 Ch. D. 701; *James* v. *Eve*, 6 H. L. 335.]

It has however been held in the case of a company having one of its articles substantially identical with Clause 27 of Table A, that the directors were thereby empowered to issue *new* shares at a discount. In this case a contract was registered previous to the issue. [*Ince Hall Rolling Mills Company*, 23 Ch. D. 545; *Plaskynaston Tube Company*, 23 Ch. D. 542.]

In any dealings in the shares of the company which a director or other officer of the company may have, he will not be allowed to use for his own advantage any special information which in his official capacity he has obtained. Thus, where a director, who was also a stockbroker entered into negotiations with a shareholder, himself a stockjobber, for the purchase of his shares, and during the negotiations obtained official information which he withheld from the shareholder who afterwards sold him the shares, the director was held liable to pay to the shareholder the profits he had realised on those shares. [*Tucker* v. *Barker*, 1881, W.N. 120.]

In this case, which is not fully reported, Bacon, V.C., in the course of his judgment, said: "If there is any principle which is well established by the Court, and about which there can be no kind of question or qualification, it is, that a director is bound to deal fairly with the shareholders upon all occasions. What is a director? He is the managing partner of a commercial undertaking. The rule which would be applicable to an ordinary partnership must be

equally applicable to dealings by directors for their own benefit with the members of the company of which they are directors. The most ample and abundant good faith is the necessary ingredient in all such transactions. It would be to shake the foundation of all the doctrines of this court if I hesitated for one moment to adopt that principle: perfect good faith, spotless honour, integrity and veracity at every part of the transaction. . . . The defendant seems to think that a director is at liberty to deal for his own profit with the shares of shareholders of the company. Under certain qualifications he may, but it must be when they are placed at arm's length, when all the director knows is communicated to the shareholders. . . . If the defendant acquired more accurate information during the progress of the negotiations can it be said that because he was ignorant of the main fact when he began, that when he paid the money and took the shares he is not to be bound; or is he protected by his previous ignorance from the obligation to disclose his after-acquired knowledge before the transaction was completed? It appears to me that there is no ground for such a proposition. . . . . In my opinion it is a transaction which cannot be sustained, having regard to the well-established principle of this Court that an agent or a director of a company trafficking in the shares of the company cannot be allowed to make a profit unless the fullest explanation is given, and the utmost truth is told, and every fact necessary for the formation of a judgment on the part of the vendor is presented to him by the intending purchaser."

Because a man is a director he is not necessarily a trustee of the shares he himself holds for the general body of shareholders; and in a vast variety of circumstances he is just as free to deal with his shares—except, perhaps, his qualification, which he cannot deal with without giving up

his directorship, as any other person. [Per Giffard, L.J., *Gilbert's Case*, 5 Ch. 565.]

"I do not at all mean to dispute the cases which have been decided, that a person who has a certain number of shares in a company which he thinks is turning out ill may get rid of those shares by selling them to anybody whom he can get to take them, provided there is no fraud committed. Whether a director can do that is a question which has never yet been determined, and I apprehend that he cannot. . . . I am of opinion that a director is not at liberty to get rid of his own liability for the purpose of throwing an increased liability upon his *cestuis que trust*." [Romilly, M.R., *Gilbert's Case*, 5 Ch. 562.]

In the case from which the above is cited the director had transferred his shares to a clerk in his service, who was admittedly unable to pay calls, when the company was on the verge of liquidation.

CHAPTER VIII.

BOARD MEETINGS.

SUBJECT to the restrictions contained in the articles of association and to the control of the company in general meeting, the directors of a company are entrusted with very general powers for the carrying on the business of the company.

The property of the company never vests in the directors [*Hooke* v. *Piper*, 14 Eq. 278], though they have full control over the whole of the assets, and the board of directors is the proper medium for dealing in and disposing of any property of the company.

A director, as such, has no power to bind the company, or to act on its behalf except under powers delegated to him by the board or conferred on him by the articles.

The board itself has no power to delegate any of its powers except the articles of the company contain provisions in that behalf. [*Howard's Case*, 1 Ch. 561; *Cartmell's Case*, 9 Ch. 691.]

The board consists of a properly convened meeting of all the directors of the company or of a quorum of their number. All directors should be summoned to all board meetings: except, of course, in the case of local or foreign directors, and subject always to the provisions of the articles.

A "quorum" consists of a defined number of the directors; such number to be fixed by the articles, or in default of any directions in the articles, such number as the directors may themselves decide.

Where the articles provide that the board may fill up

casual vacancies in their number, and gives them at the same time power to act notwithstanding any vacancy, it would seem, that in the event of the number of directors falling below the minimum fixed by the articles, the continuing board may act in this respect, and this only, for filling up the vacancy. The continuing board cannot under such provisions properly transact the business of the company until it has again reached its minimum number. [*York Tramways Company* v. *Willows*, 8 Q. B. D. 685.]

Where the business of the company is required by the articles to be conducted by not less than a certain number of directors, the board must consist of at least that number, or otherwise their acts will be invalid. [*Garden Gully Company* v. *McLister*, 1 App. Cas. 39 ; *Alma Spinning Company*, 16 Ch. D. 681.]

Where the articles empower the directors to delegate any of their powers to committees consisting of members of their body and also provide that in the construction of the articles, words importing the plural number only shall include the singular, it has been held that under these provisions the directors could delegate their powers to a single member of their body. [*Scottish Petroleum Company*, 23 Ch. D. 413 ; *Totterdell* v. *Fareham Brick Company*, 1 C. P. 674 ; *Taurine Company*, 25 Ch. D. 118.]

To act as a board the directors must be assembled at a properly constituted board meeting, to which all the directors should be summoned ; though, provided a quorum be present the attendance of the remaining directors is immaterial. Unless otherwise provided by the articles, the board are not bound to meet at any particular place, but to act jointly as a board the directors must meet as such in one place. If it were otherwise, a quorum of directors might meet at one place with power to act for the company and another quorum might at the same time meet at another place with equal power and come to opposite determinations.

Where the articles of the company do not prescribe the number of directors necessary to constitute a quorum, the number who usually act in conducting the business of the company will constitute a quorum. [*Lyster's Case*, 1 Eq. 233.]

Each director is entitled to be present at every board meeting of the company if duly qualified, and may sustain an action in his own name against the other directors, on the ground of individual injury to himself, for an injunction to restrain them from wrongfully excluding him from acting as director. He has a right by the constitution of the company to take a part in its management, to be present and to vote at the meetings of the board of directors. He has a perfect right to know what is going on at those meetings. It may affect his individual interest as a shareholder as well as his liability as a director, because it has been sometimes held that even a director who does not attend board meetings is bound to know what is done in his absence. [*Pulbrook* v. *Richmond Mining Company*, 9 Ch. D. 610; *Munster* v. *Cammell & Company*, 21 Ch. D. 183.] But the Court will not interfere to force upon the board persons who have been elected against the will of the majority by a technical flaw in the votes given against them. [*Harben* v. *Phillips*, 23 Ch. D. 14.]

Every director is bound to have a reasonable knowledge of the affairs of the company. He is not necessarily affected with notice of all the transactions entered in the books of the company [*Cartmell's Case*, 9 Ch. 691], but he is affected with notice of all proceedings of the board, the minutes of which are read and confirmed in his presence. [*Ashhurst* v. *Mason*, 20 Eq. 225.]

Generally, a director will be presumed to have known everything which in his capacity as a director he should have been acquainted with. There is no presumption of law that a director knows the contents of the books of the company. [*Hallmark's Case*, 9 Ch. D. 329.]

The knowledge of a director in a transaction in which he has not been concerned on behalf of the company, does not affect the company with notice of the fact. [*Peruvian Railways* v. *Thames Marine Company*, 2 Ch. 617; *Ebbw Vale Company Claim*, 8 Eq. 14.]

The company is not affected with notice by the knowledge of one director, unless at the time he was acting as a director on behalf of the company, and had no personal reasons for concealing his knowledge. [*Re European Bank*, 5 Ch. 358; *Ex parte Crédit Foncier*, 7 Ch. 161.]

Notice of a fact to bind the company must be made known to the board of directors acting as such at a properly constituted board meeting, which is the only way in which a company can receive notice [*Metropolitan Bank* v. *Heiron*, 5 Ex. D. 319.] But though notice to the directors of a company is *primâ facie* notice to the company, yet when it is certain that, from interested reasons, the directors will not communicate the information to the shareholders, any such notice will not be held good notice to the company. [*Re Fitzroy Steel Company*, 50 L. T. 144.]

Without express authority conferred upon them by the articles for that purpose, directors cannot delegate their powers. [*Howard's Case*, 1 Ch. 561.]

Where the articles prescribe certain acts to be done by the board, those acts, to be valid as between the company and its directors must be so done. It will not suffice to obtain the individual consent of members of the board sufficient to constitute a quorum of directors, or, indeed, the consent of all the directors separately [*D'Arcy* v. *Tamar &c. Company*, 2 Ex. 158], but subsequent ratification at a properly convened board will remedy any defect. [*Austin's Case*, 24 L. T. 932.]

Any such rules contained in the articles for the guidance of the board, are made obviously to protect the company

against fraud and malpractices or excess of that authority which it has delegated to the directors. It is for its protection alone that such rules are made. If in any case it is shown that the company is prejudiced by the infraction, violation or neglect of these rules there arises a case in which the company may say, "We are not bound by this transaction," and submit that question to the court. But where the articles provide that the directors shall do certain acts, it is not necessary that they should all meet in one place. Their combined wisdom is required in this sense, that they must all be of one mind. There may be many instances where the actual presence of a quorum cannot be procured, but where their combination can be most effectually secured by correspondence, by transmission of messages or by other means which may be resorted to. If the persons whose concurrence is necessary to give validity to the act do so concur, with full knowledge of all that they are doing, the terms of the law are fully satisfied, and it is not necessary that whatever is done by directors should be done in some particular place where a necessary quorum is assembled. [*Collie's Claim*, 12 Eq. 246.]

It is not part of the duty of a director to take part in every transaction which is conducted at a board meeting. By becoming a director he is liable for all that he does as a director, but he is not bound to attend every board meeting. His business or his pleasure may call him elsewhere, and it would be a most unheard-of thing to say that, if anything wrong was done at a board meeting, he being named among the directors but not present, he is liable for what is done in his absence. [*Perry's Case*, 34 L.T. 716.]

Each director is bound to bring to the service of the company the full benefit of his skill and knowledge. [*Aberdeen Railway Company* v. *Blaikie*, 1 Macq. 471.]

Subject to any special directions contained in the articles,

a board meeting is properly convened by a notice calling the directors together to a particular place.

The place of meeting need not be any special place; the board may be held at any place or places selected by the directors.

It is usual for directors to proceed by resolution, and minutes of their proceedings must be entered in books kept for the purpose.

The minute books of the directors are receivable as *primâ facie* evidence in all legal proceedings.

The minutes themselves must constitute a record of all resolutions and other proceedings of the board, and must be signed by the chairman of the meeting at which the resolutions were passed or proceedings held, or by the chairman of the next succeeding meeting. [C.A. 1862, s. 67.]

It is the practice of many companies to confirm the resolutions of the previous meeting, but this practice is open to the objection that doubts occasionally arise as to whether this confirmation is a condition precedent to the validity of the resolution. The minutes of the preceding meeting of the board should be read only for the purpose of verification, leaving it open to the board at any time afterwards to rescind by formal resolution any determination previously arrived at. [*Perry's Case*, 34 L.T. 716.]

Directors have usually powers by the articles to appoint committees of their number for specific purposes. A committee may consist of one or more directors. The powers of such committees are regulated by the board, and when acting within those powers a committee can bind the company as fully as the board. [*Scottish Petroleum Company*, 23 Ch. D. 413.]

Directors must have a chairman of their meetings to control and regulate the proceedings. He may be either permanently or temporarily appointed to that position. It is his duty to sign the minutes of the board.

CHAPTER IX.

STATUTORY DUTIES.

In addition to the various duties of management which their position entails upon directors, there are certain statutory obligations which the company has to comply with, and the non-observance of any of which renders every director, secretary, and manager or other officer of the company who knowingly or wilfully authorises or permits the default, personally liable to the various penalties hereinafter detailed.

Every limited company must keep its name painted or affixed legibly and conspicuously outside every office or place where the company carries on its business. Penalty for default £5 for every day during which the name is not so kept painted or affixed.

The seal of the company must have the name engraved on it in legible characters. Penalty for default £50.

The name of the company must be mentioned in legible characters in all notices, advertisements, and other official publications of the company, and in all bills of exchange, promissory notes, endorsements, cheques and orders for money or goods purporting to be signed by or on behalf of the company, and in all bills of parcels, invoices, receipts, and letters of credit of the company. Penalty for default £50, and in addition personal liability to the holder of any such bill of exchange, promissory note, cheque, or order for money or goods, for the amount thereof, unless the same is duly paid by the company. [C.A. 1862, sec. 42.]

Every limited company must keep a register of mortgages

and charges specifically affecting property of the Company, and shall enter in such register in respect of each mortgage or charge a short description of the property mortgaged or charged, the amount of charge created, and the names of the mortgagees or persons entitled to such charge. Penalty for omission of such entry, not exceeding £50. [C.A. 1862, sec. 43.]

The effect of non-compliance with this provision is that a director or other officer taking a mortgage and omitting to enter it in the register, loses his security as against the creditors of the company. [*Wynn Hall Coal Company*, 10 Eq. 515; *Native Iron Ore Company*, 2 Ch. D. 345; cf. *Smith's Case*, 11 Ch. D. 579.]

The register of mortgages must be open to inspection by any creditor or member of the company at all reasonable times free of charge. Penalty for refusing to allow inspection not exceeding £5, and a further penalty not exceeding £2 for every day during which such refusal continues. The solicitor of a creditor or member is entitled to inspect. [*Credit Company*, 11 Ch. D. 256.]

Every company must keep a register of members containing, *inter alia*, the names, addresses and occupations of the shareholders, the number of shares held by each and the amount paid up on each. Penalty for default not exceeding £5 per day while the default continues. [C.A. 1862, sec. 25.]

Every company having its capital divided into shares must annually send to the registrar of joint stock companies at Somerset House a list of members made up as of the fourteenth day after the annual ordinary general meeting, or if more than one, the first of such meetings. The list must contain certain prescribed particulars, and must be sent to the registrar within twenty-one days of such meeting. Penalty for default not exceeding £5 for every day while the default continues. [C.A. 1862, sec. 26.]

The register of members must be kept at the registered office of the company, and be open for inspection during business hours, not less than two hours daily, by any member gratis, and by any other person on payment of one shilling. Any person may require a copy of the register or of any part of it on payment of sixpence for every one hundred words. Penalty for refusing inspection or copy not exceeding £2 for each refusal, and a further penalty not exceeding £2 for every day during which such refusal continues. [C.A. 1862, sec. 32.]

Every company not having its capital divided into shares must keep at its registered office a register of directors and managers containing their names, addresses and occupations, and must send a copy of such register to the registrar of joint stock companies, and notify to him from time to time any changes which take place therein. Penalty for neglecting to keep this register or to send it to the registrar not exceeding £5 for every day during which such default continues. [C.A. 1862, sec. 46.]

A copy of every special resolution passed by the company must be printed and forwarded to the registrar of joint stock companies within fifteen days from the date of its confirmation. Penalty for default not exceeding £2 for every day during which such copy is omitted to be forwarded. [C.A. 1862, sec. 53.]

A copy of every special resolution for the time being in force must be annexed to or embodied in every copy of the articles of association that may be issued after the passing of such resolution. Where there are no articles, any member may demand a printed copy of such resolution, on payment of one shilling. Penalty for default not exceeding £1 for each copy in respect of which such default is made. [C.A. 1862, sec. 54.]

A minute of reduction of capital when registered, or a

statement of any sub-division of shares must be embodied in every copy of the memorandum of association issued after its registration. Penalty for default not exceeding £1 for each copy in respect of which such default is made. [C.A. 1867, secs. 18-21.]

On a reduction of capital it is a misdemeanor to wilfully conceal the name of any creditor of the company who is entitled to object to the proposed reduction, or to wilfully misrepresent the nature and extent of his debt or claim, or to aid or abet or be privy to any such concealment or misrepresentation. [C.A. 1867, sec. 19.]

Notice of any increase of capital, or, in some cases, of members, must be given to the registrar of joint stock companies within fifteen days after the passing of the respective resolutions authorising such increase. Penalty for default not exceeding £5 for every day during which the neglect to give notice continues. [C.A. 1862, sec. 34.]

In the event of the Board of Trade, on the application of members, appointing inspectors to examine into the affairs of the company, any director or other officer refusing to produce for their inspection all books and documents in their custody or power, or to answer on oath any question relating to the affairs of the company incurs a penalty of not exceeding £5 in respect of each offence. [C.A. 1862, sec. 58.]

Every limited banking company and every insurance company, and deposit, provident or benefit society must annually, on the first Monday in February and in August, make a prescribed statement of assets and liabilities, and display the same conspicuously in every office of the company. Penalty for default not exceeding £5 for every day during which such default continues.

In the case of limited banking companies registered since 15th August, 1879, the accounts must be annually audited by auditors elected by the company in general meeting. A

director or officer shall not be capable of being elected such auditor. Every balance-sheet must be signed by the secretary or manager, and by the directors of the company, or by three of such directors at the least. [C.A. 1879, secs. 7, 8.]

The penalties above enumerated may be recovered summarily before a stipendiary magistrate or two or more justices. All penalties to be paid to the Treasury, subject to the right of the justices to direct the whole or any part thereof to be applied towards paying the costs of the proceedings, or in or towards the rewarding the person upon whose information or at whose suit such penalties have been recovered. [C.A. 1862, sec. 66.]

These penalties are recoverable at any time whilst the default continues, and within six months after the default has ceased. [*Reg.* v. *Catholic Life Institution*, 49 L.T. 675.]

CHAPTER X.

GENERAL MEETINGS.

THE company as a corporation acts through the medium of general meetings of its members.

A general meeting of every company shall be held once at the least in every year. [C. A. 1862, sec. 49.]

The word "year" means the period of time commencing on the 1st of January and ending on the 31st of December, and not the period of twelve months commencing from the day of registration of the company. [*Gibson* v. *Barton*, 10 Q. B. 329.]

Every company must hold a general meeting within four months after its incorporation. [C. A. 1867, sec. 39.]

The Companies Acts recognize only one description of general meeting.

Thus, so long as there is a general meeting held in each year it is immaterial, for the purpose of the statutes, whether such meetings are called ordinary or extraordinary meetings.

In like manner the first general meeting after the incorporation may be either an ordinary or an extraordinary meeting, and the holding of ordinary meetings of the company may be indefinitely postponed—of course subject to the restrictions of the articles. [*Hamilton's Case*, 8 Ch. 548.]

In default of any regulations in the articles as to the summoning of general meetings, seven days' notice in writing sent to the members is sufficient.

Members residing abroad are not entitled to any notice of meetings, unless they have given an address in the United Kingdom. [*Union Hill Company*, 22 L. T. 400.]

Table A distinguishes between the ordinary general meetings of the company and those summoned out of the usual course. As these clauses are usually adopted by all companies, it is proposed to treat here of general meetings under the distinctive names by which those regulations describe them.

General meetings are of two kinds, ordinary and extraordinary.

Ordinary meetings are those convened at regular intervals not exceeding one year, in accordance with the articles.

All other meetings of the company are extraordinary meetings.

Subject to the articles of association, any business of which proper notice has been given may be transacted at any meeting.

Extraordinary meetings may be convened at any time, subject to proper notice, at the option of the directors, or on a requisition in writing signed by a specified number of shareholders.

Where by the articles of a company the directors, and in the alternative a certain proportion of the shareholders, can summon a meeting of the company, the Court will not interfere to order the directors to summon a meeting for the general purposes of the company. [*Macdougall* v. *Gardiner*, 10 Ch., 606.]

The resolutions passed by the company in general meeting, whether ordinary or extraordinary, are of three kinds: ordinary, extraordinary, or special.

An ordinary resolution may be passed by a simple majority in such a manner and may refer to such business (not required by the Acts to be effected by either extraordinary or special resolutions) as the articles permit.

An extraordinary resolution must be passed by a majority of not less than three-fourths of the votes of the members

present at the meeting personally, or by proxy if the articles so allow. Notice of such resolution must have been duly given.

The only matter required by the Companies Acts to be done by extraordinary resolution is in the case of a resolution for a voluntary winding up, when it has been proved to the satisfaction of the shareholders that the company cannot, by reason of its liabilities, continue its business. [C.A., 1862, sec. 129.]

A special resolution must be passed by a majority of not less than three-fourths of the votes of the members present at the meeting personally, or by proxy if the articles so allow. Notice specifying the intention to propose such resolution must have been duly given. This resolution must be confirmed by a simple majority at a subsequent general meeting, of which notice must be duly given, and held at an interval of not less than fourteen clear days nor more than one month from the date of the former meeting.

The articles define the nature and extent of the business that can be done by the company in general meeting—ordinary, extraordinary, and with or without notice to the shareholders. Where any particular act is required by the articles to be performed with certain formalities, those formalities must be strictly observed.

As a general rule the business of the company which can be transacted at an ordinary general meeting without any special notice, is all that appertains to the ordinary routine business of the company, such as the adoption of the report and balance-sheet, the election of directors and auditors, the declaration of a dividend, and the like.

Express notice should in all cases be given to the shareholders of all business which the directors propose to bring forward at the meeting, in order that they may not be taken by surprise or find that important alterations have been made

behind their backs. [Cf. *London and Staffordshire Fire Company*, 24 Ch. D. 149.]

Extraordinary general meetings are unknown to the Companies' Acts, and are the creation of the articles of the company, which must define the nature and extent of the business to be done, the notice to be given, and the circumstances under which the meetings are to be held.

The company in general meeting assembled proceeds by resolution; and every company must cause minutes of all resolutions and proceedings of its meetings to be duly entered in books provided for that purpose; such minutes must be signed by the chairman of that meeting, or of the next succeeding meeting. [C.A., 1862, sec. 67.]

A resolution should be moved and seconded. It is the practice to decline to put a resolution to the meeting which can find no seconder. It is at least doubtful whether this custom has the sanction of law. In the absence of directions to that effect in the articles, it is conceived that there is no power to disfranchise the mover of a resolution, who may control the majority of the votes of the company, merely because he can find no seconder in the room.

The articles of many companies provide that, on giving a specified notice to the company, any shareholder may at a meeting move resolutions beyond the matters contained in the notice convening the meeting. This power is open to the objection that matters might be brought forward and resolutions passed thereon without any previous notice to the shareholders. But any such resolution must be something subsidiary or ancillary to the terms of the notice convening the meeting. [*Imperial Hotel Company* v. *Hampson*, 23 Ch. D. 1.]

The question of amendments to resolutions is one which has, it is believed, never been legally decided. It would, however, appear to be clear that on all routine matters

amendments are admissible, and that those amendments may extend to anything within the scope of the notice convening the meeting. [*Patent Cocoa Fibre Company*, 24 W. R. 483.]

With respect to resolutions, special or extraordinary, of which, either by the statutes or the articles, special notice specifying the intention to propose such resolution must be given to the shareholders—as, for instance, resolutions for the amalgamation or winding up of the company, the resolution proposed to be passed must be substantially adhered to, and no amendment which would materially in any respect alter the nature or extent of the resolution can be put to the meeting. The resolution itself of which notice has been given must be accepted or rejected *in toto*.

It is by no means uncommon for shareholders to move, as amendments to resolutions for adopting reports, that a committee of investigation be appointed. Any such committee of shareholders so appointed has of itself no real powers, and the directors will, it is conceived, in the absence of special powers in the articles, be within their legal rights in declining to recognise the members of the committee in any other capacity than that of ordinary shareholders, and may refuse to give them any special insight into the company's affairs or any inspection of the company's books. [Cf. *Isle of Wight Railway* v. *Tahourdin*, 25 Ch. D. 320.]

If the shareholders desire to obtain an investigation into the affairs of the company, they can by a special resolution appoint inspectors for the purpose of examining into its affairs and reporting to the shareholders. [C. A. 1862, sec. 60.]

As a general rule the power of the majority of a general meeting is absolute to bind the minority in all matters within the scope of the meeting and the powers of the company. But where the majority of a company act tyrannically and

propose to benefit themselves at the expense of the minority, the Court may interfere to protect the minority. [*Menier* v. *Hooper's Telegraph Works*, 9 Ch. 350. *Atwool* v. *Merryweather*, 5 Eq. 464 n.]

The special powers given by the articles to a majority of the shareholders, however absolute in terms, must, nevertheless be construed as subject to a paramount and inherent restriction that they are to be exercised in subjection to the special purposes of the memorandum of association. [*Pickering* v. *Stephenson*, 14 Eq. 322.]

If the articles permit of the alteration of the capital, and prescribe no special method for carrying those changes into effect, an ordinary resolution will be sufficient for the purpose of increasing or consolidating the capital, for converting fully paid-up shares into stock, for issuing share warrants or for cancelling any unissued shares.

Each of the following matters is required by the Companies Acts to be performed by special resolution; and no provision in the articles allowing any of these matters to be done by other formalities will be valid. The matters to be performed by special resolution are: the sub-division of the shares into shares of lesser amount; the extinguishing of uncalled capital; the paying off of superfluous capital; the cancelling of lost capital (in each of the above instances the sanction of the Court is also required); the reduction of paid-up capital by distribution of undivided profits; all alterations in the articles and in the memorandum; any change of the company's name (this requires the sanction of the Board of Trade); the making the liability of directors unlimited; and the voluntary winding up of the company other than by extraordinary resolution.

A quorum of members as fixed by the articles, or in default of articles by Table A, must be present to make any resolution of a general meeting valid. [*De la Mott's Case* 31 L. T. 773.]

It is conceived that even though the articles fixed the quorum of a general meeting at one member, such a clause would be *ultra vires* the company. It is clear that, according to the ordinary use of the English language, a meeting could no more be constituted by one person than a meeting could have been constituted if no shareholder at all had attended. No business could be done at such a meeting. [*Sharp* v. *Dawes*, 2 Q. B. D. 26.]

At the passing of an extraordinary or special resolution, unless a poll is demanded by at least five members, the declaration of the chairman that the resolution has been carried is deemed conclusive evidence of the fact.

The demand for a poll need not be made openly and publicly. The chairman is at liberty to act upon the demand if it is brought to his knowledge. If the propriety of the poll is challenged, it may of course be necessary for him to prove that the poll was demanded by the proper number of members. [*Phœnix Electric Light Company*, 48 L. T. 260.]

In taking a poll the register of members furnishes the only means of enabling the scrutineers to strike off or admit the votes. The company has no right whatever to enter into the question of the beneficial ownership of the shares. [*Pender* v. *Lushington*, 6 Ch. D. 70.]

In computing a majority when a poll is demanded reference is to be had to the number of votes to which each member is entitled by the regulations of the company. (C. A. 1862, sec. 51.)

If it is intended to proceed by resolution under any of the sections of the Companies Acts, clear notice of such intention must be contained in the notice convening the meeting, and a reference should be made to the section under which it is proposed to act. [*Bridport Brewery Company*, 2 Ch. 191.]

At general meetings where proxies are allowed to be used, each proxy must bear a penny stamp properly cancelled if

adhesive, and may be available for one meeting or any adjournment thereof.

If the proxy authorises the nominee to vote at more than one meeting or any adjournment thereof, as, *e.g.*, "at any meeting that may be held in the year 18 ," the document must be stamped with a ten shilling stamp as a power of attorney.

If the articles of the company prescribe any formalities with respect to the use or attestation of proxies they must be strictly followed. [*Harben* v. *Phillips*, 23 Ch. D. 14.]

Proxies do not count as shareholders *present* and qualified to vote. Thus where by the articles a poll had to be demanded by shareholders qualified to vote and holding in the aggregate 2,000 shares, it was held that a member holding 20 shares only and proxies for more than 2000 was not a person holding shares within the meaning of the articles, and could not demand a poll. [*Reg.* v. *Government Stock Co.*, 3 Q. B. D. 442.]

CHAPTER XI.

POWERS OF DIRECTORS.

THE articles usually provide for the appointment of the first directors of the company; frequently also specifying them by name and defining the length of their tenure of office.

It is by no means unusual for the articles to appoint the first directors for a period of two or three years before requiring their retirement in rotation. The object of this is to permit the company to be established without the risks resulting from changes of management in the earlier stages of its career. These appointments can, however, be avoided at any time by the company by special resolution.

By Table A the first directors are determined by the subscribers to the memorandum, who, until they appoint directors are deemed to be themselves directors. When the subscribers have once exercised their right of appointment their powers are exhausted, and they are thenceforward merely ordinary members of the company.

Directors are the agents of the company, and have impliedly, by virtue of their position, general powers of management. They are really commercial men managing a trading concern for the benefit of themselves and of all the other shareholders in it. They have no power to bind the company, except within the limits prescribed by the regulations of the company; and they have not all the powers of the company conferred upon them.

The general powers of management conferred upon the directors by implication extend only to the ordinary course of

business of the company. Any further powers must be expressly conferred upon them. With the exception of powers required by the Companies Acts to be exercised by the company in general meeting, there is no limit to the powers which may be expressly conferred upon the directors by the articles of the company. [*Re Strand Music Hall*, 13 L. T. 177; *Ex parte Walker*, 18 Jur. 885.]

The powers which by the Companies Acts are to be exercised by the shareholders in general meeting of the company are:—

1. Altering the articles of association.
2. Changing the name of the company.
3. Making the liability of the directors unlimited.
4. Changing an unlimited company into a limited company.
5. Creating a reserve capital out of any uncalled capital.
6. Increasing, reducing, cancelling, sub-dividing, consolidating or otherwise altering the capital of the company.
7. Returning accumulated profits in reduction of paid-up capital.
8. All resolutions for a voluntary winding up of the company.

Where directors exceed their own authority, while still keeping within the powers of the company, the excess of authority may be ratified by the company in general meeting, either expressly or by implication through long acquiescence with sufficient knowledge, and rendered binding. [*Dronfield Coal Co.*, 17 Ch. D. 76; *Phosphate of Lime Co.* v. *Green*, 7 C. P. 43; *London Financial Association* v. *Kelk*, 1884, W. N. 67.] But any such ratification does not in itself extend the authority of the directors so as to authorise them to do similar acts in future. [*Irvine* v. *Union Bank of Australia*, 2 App. Cas. 366.]

Directors are bound to exercise the powers given to them for the benefit of the company generally, and not with a view to their own private interests only.

But directors are not under any disability to lend money to their company [*Campbell's Case*, 4 Ch. D. 470.], and, under ordinary circumstances, they may deal with their shares as fully as any other shareholder, provided they do not part with their qualifications. [*Gilbert's Case*, 5 Ch. 559.]

A director is a trustee of his powers of making calls for the general body of shareholders, and must not use them for his own benefit without regard to their interests. [*Gilbert's Case*, 5 Ch. 559.]

In all matters concerning the internal management of the company, the power of the directors is, in general, predominant to act for the benefit of the company, and the Court will not interfere with the internal arrangements of a company. [*Inderwick* v. *Snell*, 2 Mac. & G. 216.]

If directors use their powers oppressively the Court will restrain them. [*Cannon* v. *Trask*, 20 Eq. 669.]

All the powers of directors cease upon a winding up; but they still remain officers of the company without remuneration.

The resolutions of directors can be rescinded at will, and they cannot by their minutes override the constitution of the company. Thus where the articles were silent as to a director's qualification, but the directors resolved that no future director should have a less qualification than 250 shares, it was held that this resolution was inoperative. [*De Ruvigne's Case*, 5 Ch. D. 306.]

It is no part of the duty of a third person dealing with the company to inquire into the legality of the appointment of the directors who assume to act for the company. It is sufficient for him that they are *de facto* directors, and unless he knows to the contrary he is not bound to inquire into

the internal management of the company, but may assume that they are directors *de jure*. [*County Life Assurance*, 5 Ch. 288; *Pulbrook* v. *Richmond Mining Company*, 9 Ch. D. 610.]

So also where bankers, acting *bonâ fide*, duly honoured cheques signed by directors informally appointed, it was held that they were not liable to repay the money so drawn. [*Mahony* v. *East Holyford Mining Company*, 7 H. L. 869.]

The general powers of management conferred on directors extend to all acts which might reasonably be done by the managing partners of a private firm acting in accordance with a deed of partnership.

Thus an application by directors of a sum equal to a week's wages as extra pay by way of gratuity to the workers of the company out of the profits of a good year, was held a reasonable exercise of their general powers. [*Hampson* v. *Price's Patent Candle Company*, 45 L. J. Ch. 437.]

Where directors incur any personal responsibility on behalf of the company at its request they are entitled to be indemnified by the company against all necessary consequences.

Thus where directors, in whom the lease of the company's premises was vested in trust for the company, had expended their own moneys in payment of rent, it was held that they were entitled to be repaid, on the sale of the lease, in priority to all other claimants, out of the proceeds all sums which they could have been compelled to pay.

Directors who voluntarily pay their own moneys for and on behalf of the company are not entitled to any priority over the other creditors of the company. [*Pooley Hall Colliery Company*, 21 L. T. 690; *Mason and Gallagher's Case*, 46 L. T. 54.]

A director who is himself a creditor of the company is not allowed to put himself in any better position than he would have been in had he been simply an outside creditor.

Directors who are also creditors fill two distinct and antagonistic characters. In the first place they are trustees for the benefit of the company, and in the next they themselves are creditors, and have an interest to have their own debts paid. It is distinctly an improper act on the part of a director, the company being in difficulties, to direct a preferential payment to a stranger without pressure, but to direct it to be paid to himself is still worse; for a director, so long as he occupies that office, is not in a position personally to put pressure on the company. The only way in which he can exercise pressure is by ceasing to be a director, and then, when he has done that, he may require the directors to pay his money and press them to do so. [*Gaslight Improvement Company* v. *Terrell*, 10 Eq. 168.]

Directors are not trustees for the creditors of the company. The creditors have certain rights against a company and its members, but they have no greater rights against the directors than against any other members of the company. Thus where directors had given a personal guarantee for the balance of the company's account with its bankers, and the bank sued the directors on their guarantee, it was held that the directors were justified in paying up the amount uncalled on their shares, in advance of calls, to reduce the balance due to the bank. The payment was made in the ordinary course of business, and under pressure, and was not any breach of duty to the only persons, the shareholders, for whom they were trustees. [*Poole's Case*, 9 Ch. D. 322; *Ulster Railway* v. *Banbridge Railway*, L. R. Ir. 2 Eq. 190.]

As a general rule the Court will not interfere, except in cases of fraud, to restrain the directors of a company from acting as such directors. For if the persons complained of as directors are directors contrary to the wishes of the shareholders at large, or contrary to their interests, the shareholders at large have the power in their hands of setting

the matter right. The shareholders can, if they think fit, at an ordinary or extraordinary meeting, remove those directors and substitute others for them. If the Court were to interfere to restrain the directors from acting, the difficulty might arise that the preventing them from acting might very seriously interfere with the due carrying on of the business of the company; and the Court will always consider how far the granting of an injunction may in reality be more detrimental than beneficial to the interests of the company. [*Foss* v. *Harbottle*, 2 Hare, 461; *Mozley* v. *Alston*, 16 L. J. Ch. 873; *Hattersley* v. *Earl Shelburne*, 31 L. J. Ch. 873.]

But the Court will interfere on an emergency if quarrels between the directors themselves prevent the due carrying on of the business of the company. Thus where one set of the directors being in possession of the office shut the doors against the others, and those who were excluded employed labourers to ram the door down, and when they got in tried to exclude the others, the Court interfered by appointing a receiver and manager to carry on the business, and excluded all the directors from all voice in the management until a meeting had been held and a governing body appointed, to whom the management of the company was at once handed over. [*Featherstone* v. *Cooke*, 16 Eq. 298.]

CHAPTER XII.

LIABILITIES OF DIRECTORS.

DIRECTORS will not as a rule be liable to the company for any losses which the company may incur through their management, so long as they have acted *bonâ fide*. Mere imprudence, however great, provided it does not amount to gross negligence, will not subject them to personal liability for losses so arising. [*Overend* v. *Gibb*, 5 H. L. 480; *Turquand* v. *Marshall*, 4 Ch. 376.] Neither can directors be held liable for being themselves defrauded, whatever may be the case with ordinary trustees. [*Land Credit Company* v. *Lord Fermoy*, 5 Ch. 763.]

Directors are so far as regards the employment of the funds of the company trustees for the shareholders, and are answerable to their *cestuis que trust* for the due employment of the funds entrusted to them.

It is the duty of a director to learn how the money is intended to be applied which is voted at a board when he is present; it is for this purpose that the office of director is created, and that he has been elected by the shareholders. A plea of ignorance by a director is merely a plea of guilty, and is an admission of his liability to account for the sums misapplied. [*Land Credit Company* v. *Lord Fermoy*, 8 Eq. 7.]

Thus, where a director concurred in the payment of money for preliminary expenses, which included a sum for brokerage and commission for "rigging the market" in the company's shares, he was held liable to refund the sum so applied for Stock Exchange purposes, although he concurred

in the payment in ignorance of its purpose. [*Railway Light Company*, 42 L.T. 206.]

A director is not liable for any losses which the company may incur through fraud of third persons. Thus he is not liable to make good the amount of a cheque drawn with his sanction for a lawful purpose which gets into the hands of the wrong person, and the proceeds of which are misappropriated. [*Perry's Case*, 34 L. T. 716.]

It is usual for articles of association to contain an indemnity clause holding directors harmless for the consequences of any acts which, in pursuance of their duty or supposed duty, they may *bonâ fide* commit. This clause is probably operative, to indemnify the directors against the consequences of any *ultra vires* acts so far as the remedy of the company may extend.

It is also usual for articles of association to contain a clause authorising the directors to carry on any legal proceedings on behalf of the company, and indemnifying them against all liability in respect of any such proceedings. Such a clause does not operate in favour of the directors except when they act for the benefit of the company. Thus where directors took upon themselves to present a petition for winding up the company, which was dismissed, they were restrained from applying the assets of the company in paying the costs for which they were personally liable. [*Smith* v. *Duke of Manchester*, 24 Ch. D. 611.]

A director who was in no way implicated in the misapplication of the funds of the company, either by actually taking part in those transactions or even by knowing of them and abstaining from preventing them, cannot be made personally responsible unless it can be shown that his ignorance was equivalent to a breach of trust.

The fact that the directors, whom it is sought to make personally responsible, actually signed one of the cheques

constituting the payments in breach of trust, is not conclusive of his participation in the transaction complained of, unless it can also be shown that it was impossible for that director to have signed the cheque under the reasonable belief that it was required for a proper purpose; for it may be that he was induced to sign by fraud. [*Caledonian Security Company* v. *Curror*, 9 C. of S. Cas. 1115 (Sc.).]

A director is not liable for a fraud (such as the issue of a fraudulent prospectus of the company) or a misfeasance committed by his co-directors or by any other officer or agent of the company unless he has either expressly authorised or tacitly permitted its commission; for, as a general rule, one agent is not responsible for the acts of another agent, unless he does something by which he makes himself a principal in the fraud. Directors themselves are only agents of the company. [*Cargill* v. *Bower*, 10 Ch. D. 502; *Weir* v. *Bell*, 3 Ex. D., 238; *Perry's Case*, 34 L. T. 716.]

To render a director liable for any misapplication of the funds of the company it is necessary to fix him with concurrence or connivance. If a director is aware that his co-directors are proceeding to carry into effect some scheme involving an *ultra vires* act, it is not sufficient to oust his liability that he should merely protest against the arrangement. It is his duty as a director knowing what is going on not to remain quiescent or acquiescent, which is much the same thing, in what his brother directors are doing. He should proceed to call the directors together, explain his protest and insist on taking the vote of the board on the subject. If he finds that the board persist in misapplying the money of the company he might then proceed to send a general circular to every one of the shareholders to tell them what the directors are doing; or in the last resort he might appeal to the Court and stop the thing in a moment. [*Joint Stock Discount Company* v. *Brown*, 8 Eq. 376.]

The governing body of a company cannot in general use the funds for any purpose other than those for which they were contributed. By the governing body is not meant exclusively the directors but the ultimate authority within the company itself, which would ordinarily be a majority at a general meeting. The special powers given by the articles either to the directors or to a majority of the shareholders, however absolute in terms must, nevertheless, be construed as subject to a paramount and inherent restriction that they are to be exercised in subjection to the special purposes of the memorandum of association. [*Pickering* v. *Stephenson*, 14 Eq. 322.]

As has already been stated, a director stands in a fiduciary relation towards the company. He is not allowed to make any profit out of the position he thus holds, other than that allowed by the regulations of the company or by the consent of its members. [*North Eastern Railway* v. *Jackson*, 19 W. R. 198.]

On the same principle that an agent must account to his principal for any profit he has derived by virtue of his agency [*Tyrell* v. *Bank of London*, 10 H. L. C. 26], where an agent contracting on behalf of a company made a profit, he was held liable to account to the company for the profit so made. [*McKay's Case*, 2 Ch. D. 1; *Ex parte Larking*, 4 Ch. D. 566.]

The rule that a director cannot take the benefit of a contract entered into between himself and the company because he is not to make a profit in the case where he is both buyer and seller, applies even though his colleagues at the board had full knowledge of and approved of the transaction. [*Albion Steel Co.* v. *Martin*, 1 Ch. D. 580.]

Where directors who are vendors sell to the company at a fair price to the company, though at a profit to themselves, and take no part in the purchase, and make a full and fair

disclosure of their interest in the subject-matter to the shareholders in general meeting, without, however, disclosing the actual amount of their profit, the transaction cannot be impeached afterwards. [*Chesterfield Colliery Co.* v. *Black*, 37 L. T. 740; *British Seamless Paper Box Co.*, 17 Ch. D. 467.]

But where a director joins in selling a property of which he is owner or part owner to the company without disclosing his interest, the company, on discovering the fact, is entitled to claim a rescission of the contract; but the company is not entitled to compel its agent, the director, to account for the profit which he has made, for that would be in effect to make a new contract and compel the agent to sell his property at a price at which he had never agreed to sell it. [*Ambrose Lake Tin Co.*, 14 Ch. D. 390; *Cape Breton Co.*, 1884, W.N. 54.]

A company may by its articles waive the benefit of the rule, and allow its directors to contract with and make profits out of their transactions with the company. [*Imperial Mercantile Association* v. *Coleman*, 6 Ch. 568.]

But where the articles require that any director participating in any contract with the company must "declare his interest," it is not sufficient for such director merely to declare that he has an interest in the matter, but he must distinctly state the exact nature and extent of his interest. [*Imperial Mercantile Association* v. *Coleman*, 6. H. L. 189.]

The rule that an agent must not make a profit out of his agency beyond his proper remuneration extends equally to all transactions of the officers of the company. The fact that the commission has been openly taken renders the officer none the less liable to refund. Thus, where a secretary of a company stipulated with his directors that he was to have a commission on shares taken through his introduction, he was ordered to repay that commission. His liability to

refund was not affected by the fact that the board had expressly resolved that this commission should be paid to him, and that a similar commission was payable to any person introducing shareholders. The Court held that the secretary stood in a fiduciary relation towards the company, and was bound to do his best for it. [*Stapleford Colliery Co.*, 49 L. J. Ch. 253 ; *Etna Insurance Co.*, L.R. Ir. 7 Eq. 235, 424.]

A shareholder may bring an action against directors personally where he charges them as trustees and seeks redress against them for a breach of duty to the company of which he is a member. [*Ferguson* v. *Wilson*, 2 Ch. 77.]

The right of a shareholder to bring an action against directors personally is restricted to acts done by them during the period of his membership, or to acts done by the directors amounting to misrepresentation, by which he was directly induced to become such member.

When, however, a plaintiff seeks to restrain the doing of an unlawful act by a company, it is the proper course to join also the directors as defendants in the action ; because the company must act through the directors, and the injunction, if granted, will operate upon the consciences of the directors. [*Ferguson* v. *Wilson*, 2 Ch. 77.]

A director or other officer contracting on behalf of the company is not personally liable for the fulfilment of any contract within the scope of his authority which he enters into in his capacity as director. [*Okell* v. *Charles*, 34 L.T. 822.]

Thus, where directors signed on behalf of the company cheques on the company's bankers, which were duly honoured, and which overdrew the company's account, it was held that the signature of the directors to those cheques amounted only to a representation of their authority to draw, and did not render them personally liable to the bankers for the sums overdrawn. [*Beattie* v. *Lord Ebury*, 7 H.L. 102.]

But any contract he may so enter into must on the face of it be clearly expressed as entered into "for and on behalf of" the company in order to exclude his personal liability. [*McCollin* v. *Gilpin*, 6 Q. B.D. 516.]

When a director exceeds his authority he may be held personally liable for any consequences of that act.

Thus, where a director concurred in issuing debentures after the borrowing powers of the company were exhausted, the debenture was held void and the directors held personally liable to the lender for the sum advanced and interest. [*Weeks* v. *Propert*, 8 C.P. 427.]

Directors and all other officers are agents of the company, and their personal liability in an action upon a contract made by them must be governed by the ordinary law of principal and agent.

The company itself cannot act in its own person, for it has no person. It can only act through directors, and the case is, as regards those directors, merely the ordinary case of principal and agent. Whenever an agent is liable the directors will be liable. Where the liability would attach to the principal, and the principal only, the liability is the liability of the company. An agent cannot be held liable upon a proceeding which simply alleges that his principal has violated a contract that he has entered into. In that state of things, not the agent but the principal is the person liable.

With respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, no sensible distinction can be drawn between the case of fraud and of any other wrong. The master is liable for every such wrong of his servant or agent as is committed in the course of his service and for the master's benefit, because although the master may not have authorised the particular act, he has put the agent in his place to do that

class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in. It is a principle not of the law of torts, or of fraud or deceit, but of the law of agency, equally applicable whether the agency is for a company (in a matter within the scope of the corporate powers) or for an individual. [*Houldsworth* v. *City of Glasgow Bank*, 5 App. Cas. 317; *Barwick* v. *English Joint Stock Bank*, 2 Ex. 259.]

It is now held that an agent contracting as such without authority is not bound *by the contract* at all, but that he is liable in damages for the consequences ensuing from his having assumed to act with an authority which, in fact, he did not possess. It is also held that he is thus liable, although he acted *bonâ fide* and in the belief that he had the authority he assumed. Those principles are as applicable to partners and directors as to other kinds of agents. But with respect to directors, it must not be forgotten that in most cases the limits of their authority can be readily ascertained and are supposed to be known. [*Wilson* v. *Miers*, 10 C. B. N. S. 348.]

There is no obligation on the part of persons dealing with the company to see that directors exercise the powers they possess in the precise manner prescribed by the regulations of the company [*Colonial Bank* v. *Willan*, 5 P. C. 417], and it may be taken as now settled that persons dealing with directors *bonâ fide*, and without notice of an irregular or improper exercise of their powers, are not affected by such irregularity or impropriety.

Thus where directors were empowered to borrow on the bonds of the company such sums as by a general resolution of the company might be authorised to be borrowed, and the directors issued a bond which was not authorised by any resolution of the company, it was held by the Court of

Queen's Bench and the Court of Appeal that the holders were not bound to ascertain whether the issuing of the bond had been authorised by the resolution of a general meeting, and that the excess of authority was a matter which concerned only the shareholders and the directors. The bond being regular on the face of it, and the deed of settlement of the company containing a permission to borrow on certain conditions, the holder had a right to infer the fact of those conditions having been complied with. [*Royal British Bank* v. *Turquand*, 24 L. J. Q. B. 327; *Agar* v. *Athenæum Life Assurance*, 3 C. B. N. S. 725.]

Where the articles of association require certain external formalities to be observed, such, for instance, as the execution of a deed under the common seal of the company, every person contracting with the company can see at once whether that requirement is complied with, and he is bound to do so; but where the conditions required by the articles of association consist of certain internal arrangements of the company—for instance, resolutions of meetings and the like—if the party contracting with the directors finds the acts which they undertake to do to be within the scope of their powers under the deed, he has a right to assume that all such conditions have been complied with. In the case last supposed he is not bound to inquire whether the resolutions have been duly passed or the like, otherwise he would be bound to go further back to inquire whether the meetings have been duly summoned, and so ascertain a variety of other matters into which, if it were necessary to make such inquiry, it would be impossible for the company to carry on the business for which it is formed. [*Ex parte the Eagle Company*, 4 K. & J. 549; *Webb* v. *Commissioners of Herne Bay*, 5 Q. B. 642; *Ex parte Overend, Gurney & Co.*, 4 Ch. 460.]

But directors, like other agents, impliedly warrant all facts necessary to confer the authority which they profess to

exercise. [*Weeks* v. *Propert*, 8 C. P. 427; *Richardson* v. *Williamson*, 6 Q. B. 276; *Cherry* v. *Colonial Bank of Australasia*, 3 P. C. 24.]

If a man misrepresents a fact, to that fact he is bound if any other person mislead by such misrepresentation acts upon it and thereby suffers damage. [*Beattie* v. *Lord Ebury*, 7 H. L. 102.]

Therefore, in all cases where directors, whilst purporting to bind their company, act beyond their powers, they are liable to the persons with whom they deal for all consequences arising out of the non-observance of the contract into which they purported to enter on behalf of the company. No contract is, in fact, entered into, but the directors render themselves personally liable to the intending contractor as for a breach of warranty for the damage which may result to him for anything he may do under a void contract. [*Collen* v. *Wright*, 26 L. J. Q. B. 147; *Looker* v. *Wrigley*, 9 Q. B. D. 397.]

In the case of *Weeks* v. *Propert* [8 C. P. 427], which was the case of a railway company, the borrowing powers of the company under their Act of Parliament were exhausted and the directors had only a power to reborrow. Whilst the full amount of their debentures was outstanding they issued a further debenture. In this case they acted wholly beyond their powers, and were held personally liable to make good to the holder the amount of the debenture which was declared void.

In the case of *Royal British Bank* v. *Turquand* [24 L. J. Q. B. 327] the directors had powers to issue bonds to any amounts to be fixed by the company in general meeting. They issued a bond not so authorised. In this case the powers were vested in the directors to issue bonds subject to certain formalities, the non-observance of which constituted an excess of authority for which the directors might well be liable to

the shareholders, but which was no ground for repudiating the bond.

As the result of all the decisions on the point, it would appear that where a company has by its constitution only a limited power—such, for instance, as a limited power of borrowing, all persons dealing with the company are bound to see that the limited power is not exceeded. [*Irvine* v. *Union Bank of Australia*, 2 App. Cas. 366.] If this power is exceeded the company is not bound. All persons dealing with such a company are bound to inquire; and though probably if they do so inquire they will learn nothing; yet that is their misfortune, and they are none the less debarred from recovering against the company.

But, on the other hand, where the borrowing powers of the company are not themselves exceeded, although the directors or agents have nevertheless received instructions that they are not to borrow more than a certain lesser amount, then, in the event of the directors exceeding their instructions whilst keeping within the powers of the company, they will be bound, because persons dealing with the company are not to inquire into the secret authority conferred on the directors. It is sufficient for such persons to ascertain that the transaction is within the powers of the company. [*Chapleo* v. *Brunswick Building Society*, 6 Q. B. D. 696; *Ashbury Railway Carriage Co.* v. *Riche*, 7 H. L. 653; *Kent Building Society*, 30 L. J. Ch. 785; *Vale of Neath Brewery Co.*, 18 L. J. Ch. 265.]

When a director exceeds his authority and attempts to bind the company by acts altogether *ultra vires* the company, it would appear that neither the company nor the director, unless his conduct amount to the warranty of a fact, is liable thereon. [*Macgregor* v. *Dover and Deal Railway Co.*, 22 L. J. Q. B. 69. Cf. *Yorkshire Wagon Co.* v. *Maclure*, 19 Ch. D. 478.]

These distinctions in the liability of directors depend upon the rule of law that, whilst a man is liable for misrepresentation of fact [*Richardson* v. *Williamson*, 9 Q. B. 276, and see 7 Ch. 801], he is not liable for a misrepresentation of law [*Rashdall* v. *Ford*, 2 Eq. 750], unless made wilfully and fraudulently.

Where an act altogether *ultra vires* the company is done the directors will not, it is conceived, be personally liable for an honestly mistaken act which everybody is presumed to have known was void *ab initio*. [*Eaglesfield* v. *Marquis of Londonderry*, 4 Ch. D. 693.]

In all actions for misrepresentation the secretary or other officer of the company, if he joins in making the false statement, is equally liable with the directors. Thus where the chairman and secretary of a company joined in issuing a certificate that a certain person held shares in the company and it subsequently turned out that he did not, the chairman and secretary were both held liable to a person who advanced money upon the shares, although the misrepresentation was innocently made. [*Eaglesfield* v. *Marquis of Londonderry*, 4 Ch. D. 693. Cf. *Phosphate Sewage Co.* v. *Hartmont*, 5 Ch. D. 394.]

It is very difficult to tell what is a false representation of pure law, as a representation of fact must almost certainly be involved. Thus, whilst a false representation of a pure matter of law is not actionable, it has been laid down that a fraudulent misrepresentation of the law is actionable.

It has been held where directors accepted in their official capacity a bill of exchange drawn on a company which had no power to accept bills, that the directors who signed the acceptance were liable to an indorsee for value for falsely representing that they were authorised by the company to accept. [*West London Bank* v. *Kitson*, 12 Q. B. D. 157.]

The decision proceeds upon the principle that if a person

makes upon a negotiable instrument a false representation, whether made fraudulently or not, he is liable on that representation to any indorsee of the instrument, and is bound by it into whatsoever hands the bill may come. It would seem at least to be doubtful how far this decision could be supported.

Every person having dealings with a company is presumed to have full knowledge of the powers of that company as contained in their "public document," the memorandum and articles of association. [*Royal Bank of India's Case*, 4 Ch. 252; *County Life Assurance*, 5 Ch. 288; *Zulueta's Claim*, 5 Ch. 444.]

Every joint stock company has its memorandum and articles of association which are open to all who are minded to have any dealings whatsoever with the company, and those who so deal with the company must be taken to be affected with notice of all that is contained in those two documents. After that, the company entering upon its business and dealing with persons external to it, is supposed on its part to have all those powers and authorities which by the articles and memorandum of association, it appears to possess; and all that the directors do with reference to what may be called the indoor management of the company, is a thing known to them and known to them only; subject to this observation that no person dealing with them has a right to suppose that anything has been or can be done that is not permitted by the memorandum or articles of association. For instance, a person dealing with a mining company could not attempt to set up any right upon a policy of insurance as having been granted to him by the company, or to found a claim upon any other matter which is not a matter contained in their memorandum or articles. Any such person must be taken to have perfect knowledge that the company had no power to do anything of that kind, and therefore nothing can be of any avail to him that is contrary to the memorandum

and articles with which he must be taken to be acquainted. But when there are persons conducting the affairs of the company in a manner which appears to be perfectly consonant with the articles of association then those so dealing with them, externally, are not to be affected by any irregularities which may take place in the internal management of the company. They are entitled to presume that that of which only they can have knowledge, namely, the external acts, are rightly done when those external acts purport to be performed in the mode in which they ought to be performed. For instance, when a cheque is signed by three directors, they are entitled to assume that those directors are persons properly appointed for the purpose of performing that function, and have properly performed the function for which they have been appointed. Of course, the case is open to any observation arising from gross negligence or fraud. Outside persons when they find that there is an act done by a company will, of course, be bound in the exercise of ordinary care and precaution to know whether or not that company is actually carrying on and transacting business, or whether it is a company which has been stopped and wound up, and which has parted with its assets and the like. All those ordinary inquiries which mercantile men would in the course of their business make, would have to be made on the part of the persons dealing with the company. [Lord Hatherly—*Mahony* v. *East Holyford Mining Co.*, 7 H. L. 893.]

CHAPTER XIII.

MISFEASANCE.

THE term "misfeasance" is here used as something in the nature of a breach of trust, that is to say, it refers to something which the officer of a company has done wrongly by misapplying or retaining in his own hands any moneys of the company, or by which the company's property has been wasted, or the company's credit improperly pledged. It must be some act resulting in some actual loss to the company.

A director or any other officer is liable to the company for any misfeasance on his part.

Thus where a director has concurred in paying improper dividends founded on a delusive balance sheet, he can be called upon to refund to the assets of the company any dividends so paid. And in such cases directors will be ordered to repay not only the dividend they have themselves retained but also what they have paid to other shareholders. For directors are in the position of trustees, and are liable not only for what they put into their own pockets, but for what they in breach of trust pay to others. [*Flitcroft's Case*, 21 Ch. D. 519.]

Any profits of any description which he may have made out of the company, beyond the remuneration granted him by the company, a director or other officer is liable to repay.

Many cases have arisen where directors have joined the board of a new company on a promise by the promoter that he would find their qualification for them, either by

a transfer of shares, or by providing the money to enable the intending director to subscribe for the necessary qualification.

Directors so acting commit a very grave and very reprehensible breach of trust in accepting a qualification from a person who is a vendor to the company, or with whom it might be their duty to deal as trustees for the company. [*Carling's Case*, 1 Ch. D. 115.] No agent can in the course of his agency derive any benefit whatever beyond his proper remuneration as agent, without the sanction or knowledge of his principal. The Court will never sanction anything of that kind, and will make the persons who engage in such schemes pay back to the uttermost farthing whatever they have received. It is perfectly settled law that the rule applies with peculiar stringency to the directors of joint stock companies who are the agents of the company for effecting the sales or the purchases made by the company. [*Hay's Case*, 10 Ch. 593.]

If there is any agreement or understanding between a vendor and directors relative to the finding of their qualifications before all matters between the vendor and the company are closed, the directors cannot as against the company retain those shares. Any such transfer of shares would be a simple bribe or present to the directors constituting a breach of trust on their part, and a misfeasance in respect of which the company would be entitled to get back from its unfaithful trustees what they had so acquired. [*Carling's Case*, 1 Ch. D. 115.]

Thus in *Pearson's Case* [5 Ch. D. 336], where a director accepted his qualification from the vendor and then took part in ratifying on behalf of the company a contract for purchase entered into with the vendor, he was held liable for his misfeasance, on the principle that having received as a present a part of the purchase money, and being knowingly in the position of agent and trustee for the purchasers, he could not

retain that present as against the actual purchasers. Whether the purchase was, or was not an advantageous one for the company, whether the property was, or was not worth the price they paid for it, is a question wholly immaterial to be considered. A director cannot, in the fiduciary position he occupies, retain for himself any benefit or advantage that he obtains under such circumstances.

Where the money to enable the directors to pay for their qualifying shares was provided by the vendor out of the purchase-money paid by the company, it was held that the directors could not retain the money so paid them by the vendors; that the money had never ceased to be the property of the company, and that there had been in fact no payment by the directors of the money due in respect of their shares. [*Hay's Case*, 10 Ch. 593.]

There is, however, no objection to a director having his qualification given to him by the vendor or promoter if such director joins the board after the relations between the vendor or promoter and the company are at an end, and when the gift of the shares can in no sense be a bribe. [*Brown's Case*, 9 Ch. 102.]

Where directors have improperly obtained shares in the company they are liable at the option of the company to account for the shares in any one of the following ways:

1. The company may claim a re-transfer of all the shares.
2. If the shares have been sold at a profit the company may claim to receive the entire proceeds so realized. [*York and North Midland Railway Co.*, v. *Hudson*, 16 Beav. 485.]
3. If the shares have depreciated in value the company may claim the full nominal amount of the shares of which the company have been deprived.

The company may adopt whichever of these alternatives is most beneficial to itself. [*Carling's Case*, 1 Ch. D. 115.]

If any dividends have been paid by the company upon any such shares, they must be repaid, and if the company has suffered any loss of interest, that also must be made good. [*Fitzroy Steel Co.*, 50 L. T. 144.]

The sects. 115, 138, and 165 of the Act 1862 prescribe a ready means by which a liquidator, a creditor, or a contributory, can, in a winding up, examine the officers of a company on oath, and recover from them any moneys they may have obtained from or be liable to pay to the company on account of misfeasance or breach of trust in relation to their dealings with the company.

As instances where directors have been held liable for misfeasance may be mentioned the following amongst many:—

Where an insurance company undertook to invest half the premiums received in consols for the benefit of the policy-holders, and no such investment was made, a director, though resident in the country and rarely attending board meetings, was held liable in a winding up for half the premiums received during his directorship. This case was decided on the ground that it was part of a director's duty to see that the investments were made in accordance with the resolution and clauses of the partnership contract, and his not attending to it was a breach of trust to the company for which he was acting as a director; a breach of trust in respect of which he can be charged and made liable. [*Scholefield's Case*, 1882, W. N. 22; *British Guardian Life Assurance*, 14 Ch. D. 335.]

Where directors paid funds of the company to a promoter who bought therewith debentures from the company and presented some of them to the directors, retaining some of them himself, the directors were ordered jointly and severally to repay the full amount of the debentures. [*Pelly's Case*, 21 Ch. D. 492.]

In cases where dividends have been declared, though not earned, the Court has summary power, in a winding up, to order a director to repay dividends declared and paid under a delusive and fraudulent balance sheet.

But a balance sheet of a company engaged in a hazardous trade will not be considered delusive and fraudulent merely because an estimated value was put upon assets of the company which were then in jeopardy and were subsequently lost, or because the company was obliged to borrow money to pay the dividend, provided the facts fairly appeared on the balance sheet and the balance fairly represented profits. [*Stringer's Case*, 4 Ch. 475.]

Dividends must be paid out of profits actually earned, and no conjectural profits must be taken into account. The Court never authorises persons who are in a fiduciary position to indulge in a sanguine expectation as to the future, or at all events, to divide it as available dividend because of the sanguine expectations of some persons who are trustees In truth, it is a mere speculation, it is a mere fictitious mode of treating the property by talking about the possible future value of things. [*Salisbury* v. *Metropolitan Railway*, 22. L. T. 839.]

But when the articles define how the amount of net profits is to be ascertained, those profits must be determined in that way and the Court will not interfere, at the instance of a shareholder, to see that proper or any provision has been made for a reserve fund. [*Lambert* v. *Neuchatel Asphalte Company*, 51 L. J. Ch. 882.]

When directors, after proper investigation of the financial position of the company declare, and the shareholders agree to, a dividend or bonus, the Court will not lightly interfere with the payment of such dividend or bonus, on the ground that the estimates on which it was founded have turned out to be erroneous.

But when the directors declare a dividend or bonus without proper investigation or professional assistance, and it is afterwards called in question, the burden lies on them to show that is was fairly paid out of profits; and if they are unable to do so the Court will order them to refund what they have received. [*Rance's Case*, 6 Ch. 104.]

Where directors had for several years presented to general meetings of shareholders reports and balance sheets in which various debts known by the directors to be bad were entered as assets, so that an apparent profit was shown, though in fact there was none, it was held that, as regards each half-yearly dividend, the persons who were directors when it was paid were jointly and severally liable for the whole amount of the dividend paid for that half-year. [*Flitcroft's Case*, 21 Ch. D. 519.]

In the same case the shareholders had passed resolutions declaring dividends on the faith of the delusive balance sheets. It was held that even if the shareholders had known the true facts, so that their ratification of the payment of the dividends would have bound themselves individually, they could not bind the company, because the payment of dividend out of *corpus* was *ultra vires* the company, and therefore incapable of ratification by the shareholders.

The fact that the capital so improperly applied was distributed *pro rata* amongst all the shareholders, does not in any way protect the directors. The shareholders are not the company, and payment to them does not prevent the company, either before or after a winding up, from compelling the directors to replace the money, in order that it may be properly applied for the purposes of the company.

Though directors by misrepresenting the state of a company cause larger dividends to be paid than ought to have been paid, the shareholders as a body cannot make the directors liable to repay those dividends, which they as a

body have received. The company only can sue. [*Turquand* v. *Marshall*, 4 Ch. 376; *City of Glasgow Bank* v. *Mackinnon*, 9 C. of S. Cas 535.]

The creditors of a company have the right to have the capital kept for the payment of their claims. The limited company trades upon the representation of being a limited company with a paid up capital to meet its liabilities. It is wholly inconsistent with that representation that the company having its capital paid up, should pay it back to its shareholders and give the creditors nothing at all. The right of the creditors is clear, and can be enforced either by one of them or by the liquidator of the company.

Thus where dividends had been paid out of capital, the directors were ordered to refund the amounts so paid, to the liquidator, limiting the liability of each director to those sums which he participated in paying. In each transaction the directors were held jointly and severally liable to make the payment good. [*Alexandra Palace Company*, 21 Ch. D. 149; *National Funds Assurance*, 10 Ch. D. 118; *Evans* v. *Coventry*, 25 L. J. Ch. 489.]

But an innocent director was held not liable for the fraud of his co-directors, who had issued false balance sheets, audited by chartered accountants, and who passed resolutions for the payment of dividends out of capital; nor was he held liable to make good a dividend declared by a resolution formally moved by him at a general meeting at the instance of a co-director on the strength of one of the fraudulent balance sheets, to the preparation of which such co-director had been a party. [*In re Denham & Co.*, 25 Ch. D. 752; *Lees* v. *Tod*, 9 C. of S. Cas., 807 (Sc.).]

The servant who joins with and assists his master in the commission of a fraud is civilly responsible for the consequences, though his concurrence is unknown to the party

injured, for all directly concerned in the commission of a fraud are principals.

Thus, where directors of a company issue false and fraudulent reports to the public and the manager, secretary and other officers of the company supply the detailed statements for such report, knowing them to be false and that they are to be used for purposes of deceit, and a third party acting on such reports purchases shares in the company and suffers loss thereby, each of the officers of the company who knowingly assisted in the fraud is personally liable to such third party for the loss caused by such misrepresentations in the report, though the report was signed only by the directors and not by the subordinate officers. [*Cullen* v. *Thomson*, 6 L. T. 870.]

Where the articles allowed the directors to pay the preliminary expenses attendant on the formation of the company, and the directors paid without investigation the demand of the promoters, who then paid the calls due on the directors' shares, the directors were held liable to repay the full amount of the money so paid for preliminary expenses; because they were under an incapacity (by reason of the promised payment of their calls) to exercise an independent judgment in voting that sum of money. [*Englefield Colliery Company*, 8 Ch. D. 388.]

But where promotion money was improperly paid to the knowledge of a person who afterwards became a director, but took no steps to recover the money for the company, it was held that he was not liable for wilful default or misfeasance.

There is no duty imposed on a director to communicate to his shareholders knowledge acquired by him years before he joined the Board, as to misconduct with reference to the affairs of the company on the part of other persons. Nor is there any duty which compels a director to disclose his antecedent know-

ledge even of frauds committed on the company. [*Forest of Dean Coal Company*, 10 Ch. D. 450.]

A director is only liable for misfeasance in cases where he has actually taken part in or connived at the improper proceeding. Thus, a director is not liable for misfeasances committed by his co-directors without his knowledge at board meetings at which he is not present. [*Perry's Case*, 34 L. T. 716.]

But his presence at a board meeting at which the resolution, constituting the misfeasance, was read and confirmed is enough to affect him with notice and render him liable. [*Ashhurst* v. *Fowler*, 20 Eq. 225.]

Irrespective of any intentional misfeasance or breach of duty a director is liable for the consequences of any act done by him *ultra vires*, even though done *bonâ fide* and with an honest belief that the transaction was in the best interests of the company.

Thus, if directors, *ultra vires*, dispose of the assets of the company by advancing upon personal security, or by buying up shares in the company itself, they will be jointly and severally liable to the company for any loss so arising. [*Land Credit Company* v. *Lord Fermoy*, 8 Eq. 7; 5 Ch. 763.]

As between themselves directors are entitled to contribution for any sums they may so have to pay. Nor are they obliged to wait till they are sued by the company, before they apply for contributions *inter se* to make good the existing deficiency, and they are bound to make good this deficiency without waiting to see whether any actual loss to the company will eventually result. [*Power* v. *O'Connor*, 19 W. R. 923.]

Again it would seem that directors cannot be held personally responsible for any breach of trust committed by the company towards any third persons, not shareholders, even though the breach complained of may have been authorised by the board acting *bonâ fide*. For as the agent

of an agent is not thereby the agent of the original principal, so is neither the agent or trustee of a trustee (*i.e.*, the company), thereby the trustee of the original *cestui que trust* (*i.e.*, the third person.) [*Wilson* v. *Lord Bury*, 5 Q. B. D. 518]

In considering the liability of strangers (in this case the directors) who are involved with a trustee (in this case the company) in a breach of trust we have to deal with certain persons who are trustees and with certain other persons who are not trustees. Those who create a trust clothe the trustee with a legal power and control over the trust property, imposing on him a corresponding responsibility. That responsibility may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees *de son tort*, or actually participating in any fraudulent conduct of the trustee to the injury of the *cestui que trust*. But, on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers; transactions, perhaps, of which a court of equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees. [Selborne, L.C., *Barnes* v. *Addy*, 9 Ch. 244.]

With regard to the continuance of the liability of a director in respect of any misfeasance or breach of duty committed by him, the rule is as follows:—Where a trustee receives money upon an express trust and wastes it, either by neglect of duty or by doing an act not justified, the Statute of Limitations does not run against the claim of the *cestui que trust*; yet where a trustee receives money not belonging to the *cestui que trust*, but which the *cestui que trust* can claim on the ground that the receipt of it was a fraud upon him, as in the

case of a bribe or a commission, the Statute of Limitations will run against the claim of the *cestui que trust* from the time when he discovers the fraud. [*Metropolitan Bank* v. *Heiron*, 5 Ex. D. 319; *Fitzroy Steel Company*,50 L. T. 144.]

It has been held that claims against directors for misfeasance are not barred by the Statute of Limitations, and consequently, in proceedings to enforce the repayment of dividends paid out of capital, the fact that the dividends had been paid more than six years previously was held not to bar the remedy. [*Flitcroft's Case*, 21 Ch. D. 519.]

A director guilty of misfeasance cannot set off against the amount payable by him to the company a debt due to him from the company. [*Ex parte Pelly*, 21 Ch. D. 492.]

This decision is based on the two-fold ground that, first, the right of set off is a statutory right which does not come within the terms of the 165th Section of the Act of 1862; and next, that inasmuch as innocent contributories have no right of set-off against calls, so much the less should a director, manager, or other officer who has misapplied the money of the company have that right.

Money repayable by a director or other officer through his misfeasance is a debt incurred by "means of fraud or fraudulent breach of trust" within Section 30 of the Bankruptcy Act, 1883, and therefore his liability is not released by his discharge under any bankruptcy proceedings. He remains liable to repay personally that sum less any dividends received under his bankruptcy proceedings. [*Emma Mining Co.* v. *Grant*, 17 Ch. D. 122.]

A liquidator making a claim against directors of a company for misfeasance must use the same promptitude as an ordinary claimant. But special circumstances, such as a change of liquidators, will be taken into consideration on the question of delay. [*Mammoth Copperopolis of Utah*, 50 L. J. Ch. 11; *Alexandra Palace Co.*, 21 Ch. D. 149.]

Where in the course of a winding-up of any company it appears that any past or present director, manager, official, or other liquidator, or any officer of such company, has misapplied or retained in his own hands, or become liable or accountable for, any moneys of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of any liquidator, or of any creditor or contributory of the company, notwithstanding that the offence is one for which the offender is criminally responsible, examine into the conduct of such director, manager, or other officer, and compel him to repay any moneys so misapplied or retained, or for which he has become liable or accountable, together with interest after such rate as the Court thinks just, or to contribute such sums of money to the assets of the company by way of compensation in respect of such misapplication, retainer, or breach of trust as the Court thinks just. [C. A. 1862, s. 165.]

This section gives a summary power, enforceable on summons, in a winding-up. The section was "introduced in order that by proceedings under the Act without any double process or double set of proceedings, complete justice might be done between the parties and a complete winding-up effected; the instances are rare in which the jurisdiction ought not to be exercised." [*Stringer's Case*, 4 Ch. 475.]

The most convenient mode of procedure, and that generally adopted, is to examine the director, manager, or other officer under sect. 115 of the Companies Act, 1862, and having obtained information from such examination then to proceed under sect. 165.

The Court may, after it has made an order for winding-up a company, summon before it any officer of the company or person known or suspected to have in his possession any of the estate or effects of the company, or supposed to be indebted to the company or any person who the Court may

deem capable of giving information concerning the trade, dealings, estate, or effects of the company; and the Court may require any such officer or person to produce any books, papers, deeds, writings, or other documents in his custody, or power relating to the company; and if any person so summoned, after being tendered a reasonable sum for his expenses, refuses to come before the Court at the time appointed, having no lawful impediment (made known to the Court at the time of its sitting and allowed by it), the Court may cause such person to be apprehended and brought before the Court for examination; nevertheless, in cases where any person claims any lien on papers, deeds, or writings, or documents produced by him, such production shall be without prejudice to such lien, and the Court shall have jurisdiction in the winding-up to determine all questions relating to such lien. [C. A. 1862, s. 115.]

The Court may examine upon oath, either by word of mouth or upon written interrogatories, any person appearing or brought before it in the manner aforesaid, concerning the affairs, dealings, estate, or effects of the company, and may reduce into writing the answers of every such person, and require him to subscribe the same. [C. A. 1862, s. 117.]

The powers contained in these sections afford the liquidator ample opportunity for elucidating any transactions of the company which he may consider suspicious and requiring explanation. Any person who the liquidator may desire to examine can be summoned and examined under these sections. It is usual for the Court to appoint a special examiner, to take the evidence of any witnesses so summoned. [*English Joint Stock Bank*, 3 Eq. 203.]

A witness cannot refuse to answer all relevant questions on the ground that his depositions may be used against him in a pending action, although brought by the liquidator. [*Massey* v. *Allen*, 9 Ch. D. 164.]

A witness is entitled to the protection of counsel and solicitor, but they are only entitled to re-examine the witness on the evidence given for the purpose of explanation, and for this purpose only are entitled to take notes of the examination. [*Cambrian Mining Co.*, 20 Ch. D. 376.]

A witness is entitled to his reasonable expenses, and in the case of an auctioneer residing in the country he was held entitled to his first class railway fare and a guinea a day for his expenses. [*The Working Man's Mutual Society*, 21 Ch. D. 831.]

The witness is bound to answer all relevant questions, unless he swears that he believes that his answers would render him liable to a criminal prosecution.

When a witness refuses to answer a question put to him on the ground that his answer to it might tend to criminate himself, his mere statement of his belief that his answer will have that effect is not sufficient to excuse him from answering, but the Court must see from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to him from his being compelled to answer. But if it is once made to appear that the witness is in danger, great latitude should be allowed to him in judging for himself of the effect of any particular question. Subject, however, to that reservation, the Judge is bound to insist on the witness answering, unless he is satisfied that the answer will tend to place him in peril. [*In re Reynolds*, 20 Ch. D. 294.]

CHAPTER XIV.

CRIMINAL LIABILITY.

With respect to the criminal liability of directors or other officers of the company, it is provided by 24 & 25 Vict. c. 96, s. 81, that "whosoever, being a director, member, or public officer of any body corporate or public company, shall fraudulently take or apply for his own use or benefit, or for any use or purposes other than the use or purposes of such body corporate or public company, any of the property of such body or public company, shall be guilty of a misdemeanor."

By sec. 82 it is provided that "whosoever, being a director, public officer, or manager of any body corporate or public company, shall, as such, receive or possess himself of any of the property of such body corporate or public company, otherwise than in payment of a just debt or demand, and shall, with intent to defraud, omit to make, or to cause or direct to be made a full and true entry thereof in the books and accounts of such body corporate or public company, shall be guilty of a misdemeanor."

By sec. 83 it is enacted that, "whosoever, being a director, manager, public officer, or member of any body corporate or public company, shall, with intent to defraud, destroy, alter, mutilate, or falsify any book, paper, writing, or valuable security belonging to the body corporate or public company, or make or concur in the making of any false entry, or omit or concur in omitting any material particular in any book of account or other document, shall be guilty of a misdemeanor."

By sec. 84, with reference to fraudulent prospectuses, false reports and balance-sheets, it is enacted that, "whosoever, being a director, manager, or public officer of any body corporate or public company, shall make, circulate, or publish, or concur in making, circulating, or publishing any written statement or account which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder, or creditor of such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to entrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof, shall be guilty of a misdemeanor."

For any of the offences enumerated in these four sections the punishment is penal servitude for any term not exceeding seven years nor less than five years, or imprisonment for any term not exceeding two years with or without hard labour.

By sec. 166 of the Companies Act, 1862, any director, officer, or contributory of any company wound up under the Act who destroys or falsifies any books or securities of the company is guilty of a misdemeanor, and liable to imprisonment for any term not exceeding two years, with or without hard labour.

By secs. 167 and 168 provision is made for the prosecution under a winding-up with the sanction of the Court, of any past or present director, manager, officer, or member who may have been guilty of any criminal offence in relation to the company.

In the prosecution of the *Queen* v. *Gurney and others*, which was a criminal proceeding against the directors of Overend, Gurney and Company, Limited, on the charge of issuing a fraudulent prospectus, the indictment was framed on 24 & 25 Vict. c. 96, s. 84. In the course of his summing up Cockburn, C.J., said (*vide The Times*, 23 December, 1869):—

"The charge against the defendants, is in substance, this: that the business of Overend and Gurney, was hopelessly insolvent, and that the defendants, knowing that fact, conspired together to induce the public to take shares in the new company, to which the business was to be transferred for the purpose of defrauding those who should take shares in it. That is the substance of the charge, and if you should believe that such a conspiracy did in point of fact exist, and that this business was worthless to the knowledge or belief of the defendants, and that they conspired together to dispose of it knowing it to be worthless, with intent to defraud the shareholders, there can be no doubt that they committed an offence against the law; for upon the general law a conspiracy to cheat and defraud is an offence of the most serious character, and it is not the less so because it may not be directed against any particular person . . . .

"We are not here to inquire into the propriety of the proceedings of the defendants, nor whether there were misrepresentations to the shareholders. There may be some degree of misrepresentation which might support a civil action, and which would not sustain a criminal conviction. You must be satisfied, in order to convict the defendants, that there was a deliberate intention and design to cheat and defraud the public or the subscribers, and unless you are satisfied of that you cannot convict them on this indictment . . . . We are in a case of this kind on the confines which separate civil and criminal law, and we must take care that we do not overstep the boundary line. It is one thing for a man to lay himself open to blame, perhaps to an action, because he has stated something not in exact accordance with the truth, or because he has concealed or kept back some material fact which ought to have been made known, and it is quite another thing to be criminally liable for fraud. A man may honestly misrepresent that as a fact which he may at the time believe

to be true, but which turns out to be untrue, and if others have entered into a contract upon the faith of that fact, he may not be able to enforce it; but that would not be sufficient to maintain this indictment. Here you must be satisfied that the matters which are alleged to have been misrepresented were known to the defendants to be false, and that they had the intention to deceive and defraud . . . . It is not because the defendants may have taken a too sanguine view of their affairs that they are to be visited with the penalties of the criminal law. You must be satisfied that they knew and believed that the concern was worthless, and that in order to defraud they passed it off upon the public as valuable. I do not mean that it is necessary that the business should have been absolutely valueless. It would be sufficient if it was relatively so, and if the value of the business was so small that no person in his senses would, if he had known it, have taken shares in it. If the defendants, knowing that, entered into a conspiracy to induce others to take shares in it, then it would not be sufficient to excuse them that the business might be of such small value, or with such possible prospects of success as to give a trivial value to the shares, although utterly inconsiderable and disproportionate . . . I cannot help thinking that, looking at the prospectus, it does bear the construction that the concern is sound and valuable . . . . . And I should say that there is a vast difference between this prospectus and every other prospectus which has been the subject of legal proceedings of late years. Generally there has been some positive misrepresentation or fraudulent concealment of a material fact; assets have been spoken of which did not exist, or liabilities have been concealed which did; shares have been stated to have been subscribed for which were not, and money to have been realised as capital which had never been received. In one way or another there had been some actual false representations,

and even still the proceedings have almost always been civil, not criminal. And as this is a criminal proceeding we must be careful not to import into the prospectus representations not really made in it. It is, however, difficult to arrive at any other construction of the prospectus than this: that it represented that the concern was one in which there was every probability of a remunerative return. If that was a delusive and deceptive representation, then the defendants are answerable . . . Fraudulent intention in this case is everything. The guilty mind—the *mens rea*—is essential to the offence."

In the more recent case of the *Queen* v. *Murch and Others* which was an indictment preferred against the directors of the West of England Bank, and framed on 24 & 25 Vict. c. 96, ss. 83 & 84, charging them with having with intent to defraud made false entries in the books of the West of England Bank, and with having with a similar intent, published balance-sheets for the years 1876 and 1877 concerning the affairs of the bank which contained statements false to their knowledge, Cockburn, C.J., in the course of his summing up said:—

"You must be satisfied on this indictment before you can pronounce the defendants guilty of the offence charged against them of these things—that there has been a falsification, and an intentional falsification of the accounts made, circulated, and published by the directors; and you must further be satisfied that the falsification of the accounts has been done with a fraudulent intention, and with the fraudulent intention, firstly, to defraud the present shareholders and creditors of the company, and secondly, to induce persons to become shareholders; that those who held out the inducement knew that the company was in an insolvent condition and that they were committing a fraud upon incoming shareholders by the representations which they made

as to the value of the assets of the company. The whole question in this case turns upon the accounts which relate to the assets of the company. Were those accounts false to the knowledge of the defendants and were they made with the intention of committing either of the frauds to which I have directed your attention?" [*The Times*, 6 May, 1880.]

In the Scotch case of the *Queen* v. *Stewart and Others*, which was a prosecution of the directors and manager of the City of Glasgow Bank for publishing false balance-sheets, Lord Justice Clerk in his address to the jury animadverted strongly on the defence set up, viz., that the frauds charged had been committed with no criminal intent but were solely with the view of allowing the bank time to tide over its difficulties. That learned judge said [*vide Cowper's Report of the City of Glasgow Bank Trial*, p. 434]:—

"Honesty is the best policy, and neither the interests of the shareholders nor the chances of recovering the debt, nor any of those considerations which, doubtless, when one is in the middle of them, seem to be almost overwhelming, can for a moment justify or excuse or palliate the deliberate statement of what is known to be false. . . . . It may be suggested that the end which the directors intended to serve was not to injure anyone—that their real object was in the meantime to keep the bank afloat until better times should relieve their securities and their debtors and enable them to pay their way. Gentlemen, I have to tell you that so far from that being a sufficient defence it is exactly the offence, and the motive described in the indictment, because if they intended to give the bank breathing time by inducing the shareholders to believe that it was more prosperous than it was, then that is precisely the intent to deceive which is libelled in the indictment, for they put in hazard exactly the same interests which would have been imperilled if they had been actuated by the strongest and most malignant motive.

The men who were induced to hold on and the men who were induced to buy are just ruined precisely as they would have been if that had been the result intended by the directors. If they meant to represent the bank as being in a more prosperous state than it was, and if they meant the shareholders to believe that, then they intended to run the risk of all the results that might follow from that deception. And accordingly I could not certainly say to you that, even if you were satisfied that that was the real object which the directors had in view, it would tend in the slightest degree to take off from the motive or intent that is here libelled."

It should however be observed that Cockburn, C.J., in the case of the *Queen* v. *Murch*, if he did not dissent from this view of the law, at least considered it open to doubt. It is conceived that the law stands as above laid down by Lord Justice Clerk.

At common law, if the directors or officers of a company agree to publish false statements of the affairs of the company under such circumstances as show a fraudulent intent to deceive, they are not only civilly liable to those whom they have deceived and injured, but they may be criminally prosecuted and punished. There can be no doubt that a conspiracy by falsehood (as by a fictitious dividend) to raise fictitiously the market value of shares of any joint stock company that persons may be deceived and injured, and that at their expense a profit may be made by the conspirators, is an indictable offence. [*Burnes* v. *Pennell*, 2 H. L. C. 479.]

APPENDIX.

THE COMPANIES' ACT, 1862.

25 & 26 VICT. C. 89.

In the case of a company limited by shares, if the Memorandum of Association is not accompanied by Articles of Association or in so far as the Articles do not exclude or modify the regulations contained in the table marked A in the First Schedule hereto, the last mentioned regulations shall, so far as the same are applicable, be deemed to be the regulations of the company in the same manner and to the same extent as if they had been inserted in Articles of Association, and the Articles had been duly registered." Sect. 15.

FIRST SCHEDULE.

TABLE A.

REGULATIONS FOR MANAGEMENT OF A COMPANY LIMITED BY SHARES.

Shares.

(1.) If several persons are registered as joint holders of any share, any one of such persons may give effectual receipts for any dividend payable in respect of such share.

(2.) Every member shall, on payment of one shilling, or such less sum as the company in general meeting may prescribe, be entitled to a certificate, under the common seal of the company, specifying the share or shares held by him, and the amount paid up thereon.

(3.) If such certificate is worn out or lost, it may be renewed, on payment of one shilling, or such less sum as the company in general meeting may prescribe.

Calls on Shares.

(4.) The directors may from time to time make such calls upon the members in respect of all moneys unpaid on their shares as they think fit, provided that twenty-one days' notice at least is given of each call, and each member shall be liable to pay the amount of calls so made to the persons and at the times and places appointed by the directors.

(5.) A call shall be deemed to have been made at the time when the resolution of the directors authorising such call was passed.

(6.) If the call payable in respect of any share is not paid before or on the day appointed for payment thereof, the holder for the time being of such share shall be liable to pay interest for the same at the rate of five pounds per cent. per annum from the day appointed for the payment thereof to the time of the actual payment.

(7.) The directors may, if they think fit, receive from any member willing to advance the same all or any part of the moneys due upon the

shares held by him beyond the sums actually called for; and upon the moneys so paid in advance, or so much thereof as from time to time exceeds the amount of the calls then made upon the shares in respect of which such advance has been made, the company may pay interest at such rate as the member paying such sum in advance and the directors agree upon.

Transfers of Shares.

(8.) The instrument of transfer of any share in the company shall be executed both by the transferor and transferee, and the transferor shall be deemed to remain a holder of such share until the name of the transferee is entered in the register book in respect thereof.

(9.) Shares in the company shall be transferred in the following form :—

> I, A. B., of in consideration of the sum of pounds paid to me by C. D. of do hereby transfer to the said C. D. the share [*or* shares] numbered standing in my name in the books of the company, to hold unto the said C. D., his executors, administrators, and assigns, subject to the several conditions on which I held the same at the time of the execution hereof; and I the said C. D. do hereby agree to take the said share [*or* shares] subject to the same conditions. As witness our hands, the day of

(10.) The company may decline to register any transfer of shares made by a member who is indebted to them.

(11.) The transfer books shall be closed during the fourteen days immediately preceding the ordinary general meeting in each year.

Transmission of Shares.

(12.) The executors or administrators of a deceased member shall be the only persons recognised by the company as having any title to his share.

(13.) Any person becoming entitled to a share in consequence of the death, bankruptcy, or insolvency of any member, or in consequence of the marriage of any female member, may be registered as a member upon such evidence being produced as may from time to time be required by the company.

(14.) Any person who has become entitled to a share in consequence of the death, bankruptcy, or insolvency of any member, or in consequence of the marriage of any female member, may, instead of being registered himself, elect to have some person to be named by him registered as a transferee of such share.

(15.) The person so becoming entitled shall testify such election by executing to his nominee an instrument of transfer of such share.

(16.) The instrument of transfer shall be presented to the company, accompanied with such evidence as the directors may require to prove the title of the transferor, and thereupon the company shall register the transferee as a member.

Forfeiture of Shares.

(17.) If any member fails to pay any call on the day appointed for payment thereof, the directors may at any time thereafter, during such time as the call remains unpaid, serve a notice on him, requiring him to pay such call, together with interest and any expenses that may have accrued by reason of such nonpayment.

(18.) The notice shall name a further day on or before which such call, and all interest and expenses that have accrued by reason of such non-payment, are to be paid. It shall also name the place where payment is to be made (the place so named being either the registered office of the company or some other place at which calls of the company are usually made payable). The notice shall also state that in the event of nonpayment at or before the time and at the place appointed the shares in respect of which such call was made will be liable to be forfeited.

(19.) If the requisitions of any such notice as aforesaid are not complied with, any share in respect of which such notice has been given may at any time thereafter, before payment of all calls, interest, and expenses due in respect thereof, has been made, be forfeited, by a resolution of the directors to that effect.

(20.) Any share so forfeited shall be deemed to be the property of the company, and may be disposed of in such manner as the company in general meeting thinks fit.

(21.) Any member whose shares have been forfeited shall notwithstanding be liable to pay to the company all calls owing upon such shares at the time of the forfeiture.

(22.) A statutory declaration in writing, that the call in respect of a share was made and notice thereof given, and that default in payment of the call was made, and that the forfeiture of the share was made by a resolution of the directors to that effect, shall be sufficient evidence of the facts therein stated, as against all persons entitled to such share, and such declaration and the receipt of the company for the price of such share, shall constitute a good title to such share, and a certificate of proprietorship shall be delivered to a purchaser and thereupon he shall be deemed the holder of such share discharged from all calls due prior to such purchase, and he shall not be bound to see to the application of the purchase-money, nor shall his title to such share be affected by any irregularity in the proceedings in reference to such sale.

Conversion of Shares into Stock.

(23.) The directors may, with the sanction of the company previously given in general meeting, convert any paid-up shares into stock.

(24.) When any shares have been converted into stock, the several holders of such stock may thenceforth transfer their respective interests therein, or any part of such interests, in the same manner and subject to the same regulations as and subject to which any shares in the capital of the company may be transferred, or as near thereto as circumstances admit.

(25.) The several holders of stock shall be entitled to participate in the dividends and profits of the company according to the amount of their respective interests in such stock; and such interests shall, in proportion to the amount thereof, confer on the holders thereof respectively the same privileges and advantages for the purpose of voting at meetings of the company, and for other purposes, as would have been conferred by shares of equal amount in the capital of the company; but so that none of such privileges or advantages, except the participation in the dividends and profits of the company, shall be conferred by any such aliquot part of consolidated stock as would not, if existing in shares, have conferred such privileges or advantages.

Increase in Capital.

(26.) The directors may, with the sanction of a special resolution of the company previously given in general meeting, increase its capital by the issue of new shares, such aggregate increase to be of such amount, and to

be divided into shares of such respective amounts, as the company in general meeting directs, or, if no direction is given, as the directors think expedient.

(27.) Subject to any direction to the contrary that may be given by the meeting that sanctions the increase of capital, all new shares shall be offered to the members in proportion to the existing shares held by them, and such offer shall be made by notice specifying the number of shares to which the member is entitled, and limiting a time within which the offer, if not accepted, will be deemed to be declined, and after the expiration of such time, or on the receipt of an intimation from the member to whom such notice is given that he declines to accept the shares offered, the directors may dispose of the same in such manner as they think most beneficial to the company.

(28.) Any capital raised by the creation of new shares shall be considered as part of the original capital, and shall be subject to the same provisions with reference to the payment of calls, and the forfeiture of shares on nonpayment of calls, or otherwise, as if it had been part of the original capital.

General Meetings.

(29.) The first general meeting shall be held at such time, not being more than six months after the registration of the company, and at such place as the directors may determine.

NOTE. This period is now four months. C.A. 1867, s. 39.

(30.) Subsequent general meetings shall be held at such time and place as may be prescribed by the company in general meeting; and if no other time or place is prescribed, a general meeting shall be held on the first Monday in February in every year, at such place as may be determined by the directors.

(31.) The above-mentioned general meetings shall be called ordinary meetings; all other general meetings shall be called extraordinary.

(32.) The directors may, whenever they think fit, and they shall upon a requisition made in writing by not less than one-fifth in number of the members of the company, convene an extraordinary general meeting.

(33.) Any requisition made by the members shall express the object of the meeting proposed to be called, and shall be left at the registered office of the company.

(34.) Upon the receipt of such requisition the directors shall forthwith proceed to convene an extraordinary general meeting. If they do not proceed to convene the same within twenty-one days from the date of the requisition, the requisitionists, or any other members amounting to the required number, may themselves convene an extraordinary general meeting.

Proceedings at General Meetings.

(35.) Seven days' notice at the least, specifying the place, the day, and the hour of meeting, and in case of special business the general nature of such business, shall be given to the members in manner hereinafter mentioned, or in such other manner, if any, as may be prescribed by the company in general meeting; but the non-receipt of such notice by any member shall not invalidate the proceedings at any general meeting.

(36.) All business shall be deemed special that is transacted at an extraordinary meeting, and all that is transacted at an ordinary meeting, with the exception of sanctioning a dividend and the consideration of the accounts, balance-sheets, and the ordinary report of the directors.

(37.) No business shall be transacted at any general meeting, except the declaration of a dividend, unless a quorum of members is present at the

time when the meeting proceeds to business; and such quorum shall be ascertained as follows: that is to say, if the persons who have taken shares in the company at the time of the meeting do not exceed ten in number, the quorum shall be five; if they exceed ten there shall be added to the above quorum one for every five additional members up to fifty, and one for every ten additional members after fifty, with this limitation, that no quorum shall in any case exceed twenty.

(38.) If within one hour from the time appointed for the meeting a quorum is not present, the meeting, if convened upon the requisition of members, shall be dissolved: in any other case it shall stand adjourned to the same day in the next week, at the same time and place; and if at such adjourned meeting a quorum is not present it shall be adjourned *sine die*.

(39.) The chairman (if any) of the board of directors shall preside as chairman at every general meeting of the company.

(40.) If there is no such chairman, or if at any meeting he is not present within fifteen minutes after the time appointed for holding the meeting, the members present shall choose some one of their number to be chairman.

(41.) The chairman may, with the consent of the meeting, adjourn any meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

(42.) At any general meeting, unless a poll is demanded by at least five members, a declaration by the chairman that a resolution has been carried, and an entry to that effect in the book of proceedings of the company, shall be sufficient evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against such resolution.

(43.) If a poll is demanded by five or more members it shall be taken in such manner as the chairman directs, and the result of such poll shall be deemed to be the resolution of the company in general meeting. In the case of an equality of votes at any general meeting the chairman shall be entitled to a second or casting vote.

Votes of Members.

(44.) Every member shall have one vote for every share up to ten; he shall have an additional vote for every five shares beyond the first ten shares up to one hundred, and an additional vote for every ten shares beyond the first hundred shares.

(45.) If any member is a lunatic or idiot he may vote by his committee, *curator bonis*, or other legal curator.

(46.) If one or more persons are jointly entitled to a share or shares, the member whose name stands first in the register of members as one of the holders of such share or shares, and no other, shall be entitled to vote in respect of the same.

(47.) No member shall be entitled to vote at any general meeting unless all calls due from him have been paid, and no member shall be entitled to vote in respect of any share that he has acquired by transfer at any meeting held after the expiration of three months from the registration of the company, unless he has been possessed of the share in respect of which he claims to vote for at least three months previously to the time of holding the meeting at which he proposes to vote.

(48.) Votes may be given either personally or by proxy.

(49.) The instrument appointing a proxy shall be in writing, under the hand of the appointor, or if such appointor is a corporation, under their common seal, and shall be attested by one or more witness or witnesses: no person shall be appointed a proxy who is not a member of the company.

(50.) The instrument appointing a proxy shall be deposited at the registered office of the company not less than seventy-two hours before the time for holding the meeting at which the person named in such instrument proposes to vote, but no instrument appointing a proxy shall be valid after the expiration of twelve months from the date of its execution.

(51.) Any instrument appointing a proxy shall be in the following form:—

Company Limited.

I of in the county of being a member of the Company Limited, and entitled to vote [*or* votes], hereby appoint of as my proxy, to vote for me and on my behalf at the [ordinary *or* extraordinary, *as the case may be*] general meeting of the company to be held on the day of , and at any adjournment thereof [*or*, at any meeting of the company that may be held in the year].

As witness my hand, this day of .

Signed by the said in the presence of

Directors.

(52.) The number of the directors and the names of the first directors, shall be determined by the subscribers of the memorandum of association.

(53.) Until directors are appointed the subscribers of the memorandum of association shall be deemed to be directors.

(54.) The future remuneration of the directors, and their remuneration for services performed previously to the first general meeting, shall be determined by the company in general meeting.

Powers of Directors.

(55.) The business of the company shall be managed by the directors, who may pay all expenses incurred in getting up and registering the company, and may exercise all such powers of the company as are not by the foregoing Act, or by these articles, required to be exercised by the company in general meeting, subject nevertheless to any regulations of these articles, to the provisions of the foregoing Act, and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made.

(56.) The continuing directors may act notwithstanding any vacancy in their body.

Disqualification of Directors.

(57.) The office of director shall be vacated,—

If he holds any other office or place of profit under the company:

If he becomes bankrupt or insolvent:

If he is concerned in or participates in the profits of any contract with the company:

But the above rules shall be subject to the following exceptions: that no director shall vacate his office by reason of his being a member of any company which has entered into contracts with or done any work for the company of which he is director; nevertheless he shall not vote in respect of such contract or work; and if he does so vote his vote shall not be counted.

Rotation of Directors.

(58.) At the first ordinary meeting after the registration of the company the whole of the directors shall retire from office; and at the first ordinary meeting in every subsequent year one-third of the directors for the time being, or if their number is not a multiple of three, then the number nearest to one-third, shall retire from office.

(59.) The one-third or other nearest number to retire during the first and second years ensuing the first ordinary meeting of the company shall, unless the directors agree among themselves, be determined by ballot: in every subsequent year the one-third or other nearest number who have been longest in office shall retire.

(60.) A retiring director shall be re-eligible.

(61.) The company at the general meeting at which any directors retire in manner aforesaid shall fill up the vacated offices by electing a like number of persons.

(62.) If at any meeting at which an election of directors ought to take place the places of the vacating directors are not filled up, the meeting shall stand adjourned till the same day in the next week, at the same time and place; and if at such adjourned meeting the places of the vacating directors are not filled up, the vacating directors, or such of them as have not had their places filled up, shall continue in office until the ordinary meeting in the next year, and so on from time to time until their places are filled up.

(63.) The company may from time to time, in general meeting increase or reduce the number of directors, and may also determine in what rotation such increased or reduced number is to go out of office.

(64.) Any casual vacancy occurring in the board of directors may be filled up by the directors, but any person so chosen shall retain his office so long only as the vacating director would have retained the same if no vacancy had occurred.

(65.) The company, in general meeting, may, by a special resolution, remove any director before the expiration of his period of office, and may by an ordinary resolution appoint another person in his stead. The person so appointed shall hold office during such time only as the director in whose place he is appointed would have held the same if he had not been removed.

Proceedings of Directors.

(66.) The directors may meet together for the despatch of business, adjourn and otherwise regulate their meetings as they think fit, and determine the quorum necessary for the transaction of business. Questions arising at any meeting shall be decided by a majority of votes; in case of an equality of votes the chairman shall have a second or casting vote. A director may at any time summon a meeting of the directors.

(67.) The directors may elect a chairman of their meetings, and determine the period for which he is to hold office; but if no such chairman is elected, or if at any meeting the chairman is not present at the time appointed for holding the same, the directors present shall choose some one of their number to be chairman of such meeting.

(68.) The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit. Any committee so formed shall, in the exercise of the powers so delegated, conform to any regulations that may be imposed on them by the directors.

(69.) A committee may elect a chairman of their meetings. If no such chairman is elected, or if he is not present at the time appointed for holding the same, the members present shall choose one of their number to be chairman of such meeting.

(70.) A committee may meet and adjourn as they think proper. Questions arising at any meeting shall be determined by a majority of votes of the members present, and in case of an equality of votes the chairman shall have a second or casting vote.

(71.) All acts done by any meeting of the directors, or of a committee of directors, or by any person acting as a director, shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such directors or persons acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director.

Dividends.

(72.) The directors may, with the sanction of the company in general meeting, declare a dividend to be paid to the members in proportion to their shares.

(73.) No dividend shall be payable except out of the profits arising from the business of the company.

(74.) The directors may, before recommending any dividend, set aside out of the profits of the company such sum as they think proper as a reserved fund to meet contingencies, or for equalising dividends, or for repairing or maintaining the works connected with the business of the company, or any part thereof; and the directors may invest the sum so set apart as a reserved fund upon such securities as they may select.

(75.) The directors may deduct from the dividends payable to any member all such sums of money as may be due from him to the company on account of calls or otherwise.

(76.) Notice of any dividend that may have been declared shall be given to each member in manner hereinafter mentioned, and all dividends unclaimed for three years after having been declared may be forfeited by the directors for the benefit of the company.

(77.) No dividend shall bear interest as against the company.

Accounts.

(78.) The directors shall cause true accounts to be kept,—

Of the stock-in-trade of the company;

Of the sums of money received and expended by the company, and the matter in respect of which such receipt and expenditure takes place; and

Of the credits and liabilities of the company.

The books of account shall be kept at the registered office of the company, and, subject to any reasonable restrictions as to the time and manner of inspecting the same, that may be imposed by the company in general meeting, shall be open to the inspection of the members during the hours of business.

(79.) Once at the least in every year the directors shall lay before the company in general meeting a statement of the income and expenditure for the past year, made up to a date not more than three months before such meeting.

(80.) The statement so made shall show, arranged under the most convenient heads, the amount of gross income, distinguishing the several sources from which it has been derived, and the amount of gross expenditure, distinguishing the expense of the establishment, salaries, and other like matters. Every item of expenditure fairly chargeable against the year's income shall be brought into account, so that a just balance of profit and loss may be laid before the meeting; and in cases where any item of expenditure which may in

fairness be distributed over several years has been incurred in any one year the whole amount of such item shall be stated, with the addition of the reasons why only a portion of such expenditure is charged against the income of the year.

(81.) A balance sheet shall be made out in every year, and laid before the company in general meeting, and such balance sheet shall contain a summary of the property and liabilities of the company arranged under the heads appearing in the form annexed to this table, or as near thereto as circumstances admit.

(82.) A printed copy of such balance sheet shall, seven days previously to such meeting, be served on every member in the manner in which notices are hereinafter directed to be served.

Audit.

(83.) Once at the least in every year the accounts of the company shall be examined, and the correctness of the balance sheet ascertained by one or more auditor or auditors.

(84.) The first auditors shall be appointed by the directors; subsequent auditors shall be appointed by the company in general meeting.

(85.) If one auditor only is appointed, all the provisions herein contained relating to auditors shall apply to him.

(86.) The auditors may be members of the company; but no person is eligible as an auditor who is interested otherwise than as a member in any transaction of the company; and no director or other officer of the company is eligible during his continuance in office.

(87.) The election of auditors shall be made by the company at their ordinary meeting in each year.

(88.) The remuneration of the first auditors shall be fixed by the directors; that of subsequent auditors shall be fixed by the company in general meeting.

(89.) Any auditor shall be re-eligible on his quitting office.

(90.) If any casual vacancy occurs in the office of any auditor appointed by the company, the directors shall forthwith call an extraordinary general meeting for the purpose of supplying the same.

(91.) If no election of auditors is made in manner aforesaid the Board of Trade may, on the application of not less than five members of the company, appoint an auditor for the current year, and fix the remuneration to be paid to him by the company for his services.

(92.) Every auditor shall be supplied with a copy of the balance sheet, and it shall be his duty to examine the same, with the accounts and vouchers relating thereto.

(93.) Every auditor shall have a list delivered to him of all books kept by the company, and shall at all reasonable times have access to the books and accounts of the company. He may, at the expense of the company, employ accountants or other persons to assist him in investigating such accounts, and he may, in relation to such accounts, examine the directors or any other officer of the company.

(94.) The auditors shall make a report to the members upon the balance sheet and accounts, and in every such report they shall state whether, in their opinion, the balance sheet is a full and fair balance sheet containing the particulars required by these regulations, and properly drawn up so as to exhibit a true and correct view of the state of the company's affairs, and in case they have called for explanations or information from the directors, whether such explanations or information have been given by the directors, and whether they have been satisfactory; and such report shall be read, together with the report of the directors, at the ordinary meeting.

Notices.

(95.) A notice may be served by the company upon any member either personally or by sending it through the post in a prepaid letter addressed to such member at his registered place of abode.

(96.) All notices directed to be given to the members shall, with respect to any share to which persons are jointly entitled, be given to whichever of such persons is named first in the register of members; and notice so given shall be sufficient notice to all the holders of such share.

(97.) Any notice, if served by post, shall be deemed to have been served at the time when the letter containing the same would be delivered in the ordinary course of the post; and in proving such service it shall be sufficient to prove that the letter containing the notices was properly addressed and put into the post office.

Dr. BALANCE SHEET of the Co. made up 18 . *Cr.*

CAPITAL AND LIABILITIES.			£ s. d.	£ s. d.	PROPERTY AND ASSETS.			£ s. d.	£ s. d.
I. CAPITAL .		*Showing:*			III. PROPERTY held by the company.	7	*Showing:* *Immovable Property, distinguishing—*		
	1	*The Number of Shares.* . .					*(a) Freehold Land* . . .		
	2	*The Amount paid per Share* .					*(b) „ Buildings* . .		
	3	*If any Arrears of Calls, the Nature of the Arrear, and the Names of the Defaulters.*					*(c) Leasehold „* . .		
	4	*The Particulars of any forfeited Shares.*				8	*Moveable Property, distinguishing—* *(d) Stock in Trade* . . . *(e) Plant* . . . . . *The Cost to be stated with Deductions for Deterioration in Value as charged to the Reserve Fund or Profit and Loss.*		
II. DEBTS AND LIABILITIES of the Company.		*Showing:*							
	5	*The Amount of Loans on Mortgages or Debenture Bonds.*			IV. DEBTS owing to the company.		*Showing:*		
	6	*The Amount of Debts owing by the Company, distinguishing—* *(a) Debts for which Acceptances have been given.* *(b) Debts to Tradesmen for Supplies of Stock in Trade or other Articles.* *(c) Debts for Law Expenses* . *(d) Debts for Interest on Debentures or other Loans.* *(e) Unclaimed Dividends* . . *(f) Debts not enumerated above*				9	*Debts considered good for which the Company hold Bills or other Securities.*		
						10	*Debts considered good for which the Company hold no security.*		
						11	*Debts considered doubtful and bad. Any Debt due from a Director or other Officer of the Company to be separately stated.*		
VI. RESERVE FUND.		*Showing:* *The amount set aside from Profits to meet Contingencies.*			V. CASH AND INVESTMENTS.		*Showing:*		
						12	*The Nature of Investment and Rate of Interest.*		
VII. PROFIT AND LOSS.		*Showing:* *The disposable Balance for Payment of Dividend, &c.*				13	*The Amount of Cash, where lodged and if bearing Interest.*		
CONTINGENT LIABILITIES.		*Claims against the Company not acknowledged as Debts.* *Moneys for which the Company is contingently liable.*							

INDEX.

ABORTIVE COMPANY,
expenses of, how borne, 30
Deposits received by, 30

ACCEPTANCE
of office by director, 21
of application for shares, 52
of bill without power, 97

ACTION
will not lie, by officer, for breach of articles, 6
for deceit, 36
against executors of director, 36
delay no answer to, 44
by director for exclusion from board meeting, 63
by shareholder against director, 91
by shareholder against company, 91

ADOPTION
by company of contract, 25
by company, duties of directors, 27

AGENT,
liability of, acting for non-existing principal, 32
acting without authority, 93
making illicit profit, 101

ALLOTMENT
must be communicated, 52
must be unqualified acceptance, 52
directors cannot delegate powers of, 52
to infants, 53

AMENDMENTS
to resolutions, 75
to special resolutions, 76

APPOINTMENT
of directors, 15
of directors by subscribers to memorandum, 15, 80
irremovable, 16
how made, 16
valid, 16
period of, 16
of persons not eligible, void, 22
outsiders need not question, 82

ARTICLES OF ASSOCIATION
are contract between shareholders, 6, 15
appointments of officers by, 15
are presumed to be ordinary, 44
every special resolution must be annexed, 69
indemnity clause in, 87
clause for instituting legal proceedings, 87
may allow directors to make profit, 90
observance of formalities required by, 94
all persons presumed to know, 98

AUTHORITY
general scope of officers, 8
liability for excess of, 92, 108

BALANCE SHEET,
publication of by certain companies, 70
signature of, by bank company, 70
delusive, liability of directors, 100
fraudulent, 115, 118, 119, 120

BANKING COMPANY,
publication of balance sheet by, 70
annual audit of, 70

BANKRUPTCY
claims against directors not released by, 110

BENEFICIAL OWNERSHIP
not necessary to qualify director, 23
not necessary to right to vote, 78

BILLS OF EXCHANGE,
acceptance by company without power, 97

BOARD,
declining to receive colleagues, 17
when less than minimum number 56, 61
cannot delegate powers except articles permit, 61
how constituted, 61
appointment of committees, 66
can rescind its own resolutions, 82

BOARD MEETINGS,
constitution of, 61.
directors must be summoned to, 62, quorum at, 61.
place of, 62, 66.
every director entitled to be present at, 63
directors must act at, 64
chairman of, 66
minutes of, 66

BOARD OF TRADE
may examine into affairs of company, 70

BOOKS,
director not presumed to know contents of, 63
inspection of, 70
fraudulent entries in, 114, 115
,, mutilation of, 114, 115

BORROWING,
exceeding powers of, 95

BREACH OF TRUST,
acceptance of bribes by directors in, 101

BRIBES,
to directors of qualifying shares, 101
when claim for, barred, 110

BUSINESS,
transacted at general meeting, 74
special, at general meeting, 74
beyond that specified in notice, 75
to be done by ordinary resolution, 77
to be done by special resolution, 77

CALLS,
may be made notwithstanding promises to the contrary, 44
powers of directors to make, 56
made with improper motive, 56
must be made by board, 56
must be made alike on all shares, 57
must be made alike unless articles otherwise permit, 57
directors cannot compound for, 57

CAPITAL,
any alterations in, to be effected by general meeting, 77, 81
distribution of, in dividends, 105, 106
must be kept intact, 106

CASUAL VACANCY,
definition of, 16
how filled up, 17
act of directors during, 53
when directors must fill up, 61

CHAIRMAN,
of meeting, declaration of, 17, 78
of board, 66

CLERGYMAN,
may not be a director, 2
except in certain cases, 2

CLERKS,
see OFFICERS

CO-DIRECTORS,
declining to receive a director, 17, 63
duties to, 30
fraud of, 36, 106

COMMISSION,
virtually salary, where none paid, 13

COMMITTEE,
appointment of, by board, 66
of investigation, 76

COMPANY,
cannot contract before registration, 25
right of, to rescind contract if directors interested, 28
acts by general meetings, 72
liability of, for fraud of agents, 92
powers of, limited by constitution, 96
rights of, against directors, to account, 102
can claim return of improper dividends, 106
breach of trust of, 108

CONDITION PRECEDENT,
when qualification is, 22

CONTRACT,
of service, breach of, 7
not disclosed in prospectus, liability of officer, 7
company cannot, before incorporation, 25
interest of directors in, 27, 90
rescission of, for misrepresentation, 35
must be disclosed in prospectus, 45
what kinds must be disclosed, 46
sub-contracts must be set out, 50
details of need not be given, 50
clause in prospectus, waiving disclosure of, 50
for issue of shares as fully paid, 52
must be "for and on behalf of" the company, 92

CONTRIBUTION,
amongst directors, 108

COURT,
interference of, to institute directors, 17, 63
will not interfere with decision of shareholders, 18
will not summon general meeting, 73
will not interfere in internal management, 82, 84
will restrain directors acting oppressively, 82
will interfere on emergencies, 85

CREDITORS,
directors are, for unpaid fees, 19
no priority to directors, 83
directors are not trustees for, 84
duties of, to inquire, 96
presumed to know memorandum and articles, 98
rights of, to have capital kept intact, 106

CRIMINAL LIABILITY
concealing name of creditor on reduction of capital, 70
fraudulent misappropriation of funds, 114
fraudulent entries in books, 114
fraudulent mutilation of books, 114
fraudulent prospectus, 115
fraudulent balance sheet, 115

DAMAGES
of officer, for wrongful dismissal, 10
against directors and officers, for misrepresentation, 42

DEALINGS
by directors, in shares, 58

DEBENTURES,
excessive issue of, 95

DECEIT,
action against directors for, 36, 40
delay no answer to action for, 44

DEFINITION
negative of directors, 1
of casual vacancy, 16
of "eligible," 24
of "promoter," 26, 47
of "issue" of prospectus, 47
of "knowingly issue," 48
of "quorum," 61
of "year," 72
of "misfeasance," 100

DELAY
no defence to action for deceit, 44

DELEGATION
of power by director to officer, 8, 52, 64
of power by Board, 61, 64

DEPOSITS
received by abortive company, 30

DISCOUNT,
issue of forfeited shares at, 57
issue of original shares at, 58
issue of new shares. 58

DISCRETION
of directors, to refuse transfers, 53

DISMISSAL
of directors, how affected, 17
of officers, 10

DIRECTORS
entrusted with management of company, 1, 80, 83
negative definition of, 1
who may be, 2
who may not be, 2
stand in fiduciary relation, 2, 29
unlimited liability of, 8
delegation of power, 8, 52, 64
liability of, for fraud, 10
election of, 15, 16
first, 15, 26. 27
continuance in office, 16
holding office of profit, 16
new, 16
casual vacancy among. 16, 53, 61
disputed election of, 17
removal of, 17
remuneration of, 18
must make no profits, except remuneration, 18, 89, 100
can sue for fees, when, 20
past services, remuneration for, 20
special fees to individual, 21
need not necessarily be shareholders, 21
qualification of, 21
acceptance of office by, 21
acting as, 22
void appointment of, 22
ordinary powers of, 23
ownership of qualifying shares, 23
qualification, how obtainable, 24, 102
purchase of property by, from promoters, 26
approval of contracts by, 27
must not be buyers and sellers, 27, 29, 90
must devote best skill and knowledge, 30, 65
action for deceit against, 36
liable for misrepresentation, 37
action against executors of, 36
discretionary powers to refuse transfers, 53
power to make calls, 56
call must be made by Board, 56
cannot take advantage of defect of Board, 57

DIRECTORS—*continued.*
dealings of, in shares of company, 58, 82
cannot get rid of liability on shares at expense of shareholders, 60
property of company never vests in, 61
have no power to act individually, 61
must be summoned to Board meetings, 61
number of, 61, 62
right to be present at all Board meetings, 63
knowledge of affairs of company, 63
statutory duties of, 67
penalties for neglect of statutory duties, 67
company can ratify, excess of authority of, 81
must use power for general benefit of company, 82
court will restrain, if acting oppressively, 82
powers cease on winding up, 82
de facto but not *de jure*, 82
to be indemnified against liability, 83, 87
as creditors, no priority, 83
not trustees for creditors, 84
not liable for *bona fide* losses, 86
are trustees of the funds, 86
ignorance no excuse for breach of duty, 86
misapplication of funds by, 87, 108
profits by, after full disclosure, 90
articles may allow, to make profits, 90
not liable for contracts of company, 91, 92
personally liable for excess of authority, 92, 93, 95, 108
warrant the authority they exercise, 94
ultra vires, acts of, 96, 108
accepting bills without power, 97
misfeasance of, 100, 103
bribes to, 101
joint and several liability of, 105, 106, 108
not liable for fraud of co-directors, 36, 106
preliminary expenses, payment of, 30, 107
antecedent knowledge of, 107
connivance of, in misfeasance, 87, 108
contribution amongst, 108
not liable for breach of trust of company, 108
misfeasance not released by bankruptcy, 110
criminal liability of, 70, 114

DIVIDENDS
improper, 104
how to be ascertained, 104
directors must refund improper, 104
capital not to be distributed in, 105
paid out of capital, 106

DUTIES.
See DIRECTORS, OFFICERS, STATUTORY DUTIES.

ELECTION
of directors, 15
valid, 16
in general meeting, 17
when disputed, 17

"ELIGIBLE,"
when director is, 22
meaning of, 24

EVIDENCE,
minute books *prima facie*, 66

EXAMINATION OF WITNESSES
in a winding up, 103, 111

EXECUTOR,
action against, of deceased director, 36

EXTRAORDINARY MEETING,
how convened, 73

EXTRAORDINARY RESOLUTION
how passed, 73
when legally requisite, 74
amendments to, 76

FEES.
See REMUNERATION.

FIDUCIARY RELATION
of director towards company, 2
of promoter towards company, 25
of officer towards company, 5

FORFEITURE
of shares for non-payment of calls, 57

FRAUD.
acting as agent for another, no defence, 6, 106
of agent, how company affected, 9
liability of directors for, 86, 88
of co-directors, 106
officers assisting in, 107

GENERAL MEETING,
vote of remuneration to directors, 18
must be held once a year, 72
first, 72
notice of, 72
ordinary and extraordinary, 73
court will not summon, 73
business to be transacted at, 74
notice of special business, 74
proceeds by resolution, 75,
business beyond that contained in notice, 75
amendments to resolutions, 75
power of majority to bind minority, 76
quorum of members to constitute, 77
one member cannot be a, 78
declaration of chairman of, 78
demand of poll, 78
proceeding under special section of companies act, 78
proxies at, 79
powers to be exercised only in, 81

IGNORANCE,
no excuse for neglect of duty, 86

INDEMNITY,
directors are entitled to, 83
clause in articles, 87

INFANT,
allotment of shares to, 53
transfer of shares, 55

INSPECTORS
into affairs of Company, 76

INTERNAL MANAGEMENT
of company, court will not interfere in, 82, 84
creditors need not inquire, 93, 99

INVESTIGATION,
committee of, 76
appointment of inspectors 76

ISSUE
of prospectus, 47

JOINT AND SEVERAL,
liability of Directors, 104, 108

KNOWLEDGE
of directors of affairs of company, 63
of directors not always notice to company, 64
of persons dealing with Company, 98
directors need not disclose antecedent, 107

"KNOWINGLY ISSUE,"
definition of term, 48

LIABILITY
of directors for *bona fide* losses, 86
for frauds, 86, 88
for frauds of co-directors, 36, 106
for misapplication, 87
to account for profits, 89
to account after full disclosure, 89
and officers for contracts of company, 91, 92
for *ultra vires* acts, 96
for misrepresentation of law, 97
for delusive balance sheet, 100
for improper dividends, 104, 106
joint and several, 105, 106, 108
for breach of trust by company, 108
of officers to account for profits, 90
for false balance sheet, 107
of company for fraud of agent, 92
statute of limitations 108,
see PERSONAL LIABILITY.

LOSSES
liability of Directors for, 86

MANAGEMENT
of company devolves on directors, 1
external, 98
internal, 93, 99

MANAGER,
liability may be unlimited, 3
see OFFICERS

MANAGING DIRECTOR,
liability may be unlimited, 3
can only be by express authority in articles, 81

MAJORITY
power to vote remuneration to directors, 20
power to bind minority, 76
must act in accordance with memorandum, 77
at a poll, how ascertained, 78

MARRIED WOMAN
can hold shares, 55

MEASURE OF DAMAGES
of officers, for wrongful dismissal, 10
for misrepresentation 43

MEETINGS,
see GENERAL MEETINGS

MEMBERS,
notice to, residing abroad, 72.

MEMORANDUM OF ASSOCIATION,
minute of reduction of capital to be annexed to, 70
all persons presumed to know, 98

MINIMUM
number of directors, 61, 62

MINORITY,
bound by majority, 76
except when majority tyrannical, 76

MINUTES
of resolutions of board, 66
of general meeting, 75

MISAPPLICATION
of funds, connivance of director, 88, 103
fraudulent, 114

MISFEASANCE
of directors and officers, 100
delusive balance sheet, 100
bribe from promoters, 101
gift of qualifying shares, 101
remedy of company for, 102
misapplication of funds, 103, 108
improper dividends, 104
improper preliminary expenses, 107
must have actually connived at, 108
claims cannot be set off against, 110
claims for, not barred by bankruptcy, 110
claims for, should be made promptly, 110
mode of proceeding in, 111

MISREPRESENTATION
material, 36, 40
ground for rescision of contract, 35
ground for action for deceit, 37
innocent, 41, 97
plaintiff must have relied on, 42
trivial, 42
measure of damages for, 43
of fact, 95, 97
liability of officers for, 97
of law, 97

NAME OF COMPANY
must be affixed, 67
must be used in all notices, &c., 67

NEGLIGENCE,
liability of servant for, 6

NONDISCLOSURE
of contract in prospectus, effect of, 45
of facts, in prospectus, 36

NONFEASANCE,
director not generally liable for, 2

NOTICE
to officers, to determine hiring, 10
when none required, 11
of resolution to remunerate directors, 20
to company, of misfeasance, 29
to director, not always notice to company, 64
to company, how receivable, 64
of general meeting, 72
of general meeting, to members residing abroad, 72
of special business at general meeting, 74
of intention to proceed under section of Companies Act, 79

OFFICERS,
manager may have unlimited liability, 3
position of, 5
where certain duties specified in articles, 6
are not parties to articles, 6
no obligation to commit fraud, 6
liability of, for negligence, 6
liability of, for breach of contract, 7
statutory duties of, 7, 67
liability for contracts not disclosed in prospectus, 7
liability for statements in prospectus, 8
general scope of authority, 8, 9
powers of, to bind company, 9
fraud of, 9, 107
wrongful dismissal of, 10
winding up, notice of discharge to, 11
arrears of salary, in winding up, 11
when winding up, not notice to, 11
claims of, in winding up, for loss of employment, 12
appointments contained in articles, 15
appointments, how made, 16
irremovable appointment of, 16
liability of, before incorporation, 32
penalties for neglect of statutory duties, 67
must not make profits out of company, 90
liability of, for misrepresentation, 97
misfeasance of, 100, 103, 111

OFFICERS—*continued.*
assisting in a fraud, 107
liability of, for false balance sheets, 107
examination of, in winding up, 111
criminal liability of, 70, 114, 119, 120

PAST SERVICES,
remuneration of directors for, 20

PENALTIES,
for neglect of statutory duties, 67, 68, 69, 70
how recoverable, 71
within what period recoverable, 71

PERSONAL LIABILITY
of directors and officers, for fraud of company, 10
of directors and officers, for misrepresentation in prospectus, 42
of directors and officers, for omitting to disclose contracts, 42
of directors and officers, for penalties, for neglect of statutory duties, 67
of directors and officers, for contracts on behalf of company, 91, 92
of directors and officers, for excess of authority, 92, 95
of directors and officers, for accepting bills without power, 97
of directors and officers, for misfeasance, 100
of directors and officers, for misfeasance, notwithstanding bankruptcy, 110
see LIABILITY.

POLL
must be demanded by five members, 78
share list conclusive of right to vote, 78
majority how ascertained, 78
proxies cannot demand, 79

POWERS
of directors, limited to general management, 23, 80
of directors, cannot be delegated, 8, 52, 64
of board cannot be delegated, 61, 64
no limit to, if conferred by articles, 81
to be exercised only in general meeting, 81
of directors, to be used for general benefit, 82
of directors, cease on winding up, 82
of directors, may be assumed as correctly exercised, 93
of company, limited by its constitution, 96

PRELIMINARY EXPENSES
of abortive company, how paid, 30

PROFITS,
directors must make no, 18, 89
of promoters, 47, 49
agent must account to company for, 89, 101
by officers, 90
company's right to all, 100

PROMOTER,
fiduciary position of, 25, 46
who is, 25, 47
duties and position of, 26
liability for expenses, 31
secret profits of, 47
profit of must be disclosed, 49
promotion money, 107

PROOF,
for salary, in winding up, 11
claim of officers, loss of employment, 12

PROPERTY,
acquisition of, by company, 27
of company never vests in directors, 61
of company to be used for purposes of company only, 89
of company, fraudulent misapplication of, 114

PROSPECTUS,
liability of officers for, 8
persons issuing, responsible for, 34, 40
proper office of, 35, 43
statutory requisite, 35
misrepresentation in, 40
allottee may rely implicitly on, 39
original allottees only entitled to rely on, 43
contracts must be disclosed in, 45
what kind of contracts must be disclosed, 46
issue of, 47
sub-contracts must be set out, 50
clause in, waiving disclosure of contracts, 50
memorandum should be printed on, 51
fraudulent, 115

PROVISIONAL AGREEMENT,
duties of directors as to adoption of, 27

PROVISIONAL COMMITTEE,
liability of, for expenses, 31

PROXIES,
stamp, on, 78
formalities to be strictly observed, 79
not shareholders present, 79

QUALIFICATION,
of directors, when necessary, 21
when condition precedent, 22
beneficial ownership not necessary, 23
shares in his own right, 23
how obtainable, 24, 102
gift by promoter, 24, 100, 102

QUORUM,
of directors at board meeting, 61
what constitutes, 63
of members to constitute general meeting, 77
one member cannot be, 78

RATIFICATION,
by company of contracts, 25, 33
by whom and when possible, 32
by board of irregular resolutions, 64
by company of acts of directors, 81
acquiescence amounting to, 81

REDUCTION OF CAPITAL,
minute of must be annexed to memorandum, 69

REGISTER OF DIRECTORS,
certain companies must keep, 69
send copy to Registrar, 69

REGISTER OF MEMBERS,
every company must keep, 68
send copy annually to Registrar, 68
allow inspection and copy of, 69

REGISTER OF MORTGAGES,
every company must keep, 67
allow inspection of, 68

REGISTRATION,
company cannot contract before, 25

REMUNERATION.
of directors, 18
offer to forego, 19
arrears of, 19
when company insolvent, 19
may be sued for, 20
for past services, 20
special to individual directors, 21
ceases on winding-up, 82

REMOVAL,
of directors, how effected, 17

RESCISSION,
of contract by company, 28
of resolution of directors, 82

RESOLUTION
of directors cannot alter constitution, 22
can be rescinded, 82
minutes of, 66
of meeting, how passed, 73
general meeting, proceeds by, 75
not seconded, 75
beyond matters contained in notice of meeting, 75
amendments to, 75

SALARY,
arrears of, in winding up, 11
of directors, 18

SEAL
of company, name must be engraved, 67

SECRETARY,
general duties of, 8
See OFFICERS

SECRET PROFIT
of promoters, 47

SERVANTS,
negligence of, 6
gratuities by Board to its, 83
See OFFICERS

SET OFF
where liability of director or manager unlimited, 3
director cannot, for misfeasance, 110

SHARES
must be paid for in cash, 52
or by registered contract, 52
allotment of, 52
transfers of, 53
transfers to married women, 55
transfers to infants, 55
form of transfer of, 55
calls on, 56
forfeiture of, 57
re-issue of forfeited, 57
re-issue of surrendered 57
re-issue of lapsed, 57
dealings by directors in, 58
holding of, conclusive of right vote, 78

SPECIAL RESOLUTION
must be annexed to articles of association, 69
forwarded to registrar, 69
how passed, 74
amendments to, 76
business to be done by, 77

STATUTE OF LIMITATIONS
when claim against directors not barred, 29, 109, 110

STATUTORY DUTIES
of officers and directors, 7, 67
name of company must be affixed and used, 67
seal must be engraved, 67
register of mortgages, 67
register of members, 68
register of directors, 69
special resolutions, 69
reduction of capital, 69
increase of capital, 70
inspection of books, 70
publication of balance sheet, 70

STOCK EXCHANGE,
requirements of, 51

SUB-CONTRACTS. *See* CONTRACTS.

SUBSCRIBERS TO MEMORANDUM,
nomination of directors by, 15

TABLE A. *See* APPENDIX.

TRANSFER
of shares, directors powers to refuse, 53
to married women, 55
to infant, 55
form of, 55

TRUSTEE,
directors differ from, 2
director, for benefit of Company, 84
director, not for benefit of creditors, 84
company as, for third persons, 108

ULTRA VIRES,
acts of directors, 96, 108

UNLIMITED LIABILITY
of directors or managers, 3
liability ceases one year after retirement, 3
right of set off against liability, 3

VENDOR. *See* PROMOTER.

VOTES
transfers of shares to multiply, 54
See PROXIES.

WAGES
of labourer or workman, in winding up, 11
one week's extra pay as bonus, 83

WINDING UP,
arrears of wages and salary in, 11
is notice of discharge, 11
remuneration of directors in, 20
extraordinary resolution for, 74
powers of directors, cease on, 82
claims against directors in, 103
proceedings for misfeasance in, 111
examination of witnesses in, 111

WITNESS
must answer relevant questions, 112
entitled to protection, 113
entitled to reasonable expenses, 113
not bound to criminate himself, 113

WRONGFUL ACTS,
company liable for, of officers, 9

WRONGFUL DISMISSAL,
remedy of officer for, 10

YEARLY HIRING,
length of notice to determine, 10

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GENERAL.—SEC. 127.

No. of Form.	
3	DECLARATION of Inability to Pay.
4	DEBTOR'S Petition.
5	REQUEST for Issue of Bankruptcy Notice.
6	BANKRUPTCY Notice.
7	AFFIDAVIT of Service of Bankruptcy Notice.
8	AFFIDAVIT on Application to set aside Bankruptcy Notice.
9	ORDERS setting aside Bankruptcy Notice.
10	CREDITOR'S Petition.
11	CREDITOR'S Petition for Administration of Estate of deceased Debtor under Sec. 125.
12	AFFIDAVIT of Truth of Statements in Petition.
13	AFFIDAVIT of Truth of „ „ (General Deponents).
14	APPLICATION for Interim Receiver.
15	AFFIDAVIT of Service of Petition.
16	SUBSTITUTED Service of Petition. (Notice in Gazette).
17	NOTICE by Debtor of Intention to oppose Petition.
18	ORDER to stay Proceedings on Petition.
19	BOND on stay of Proceedings, &c.
19A	„ „ (Bankruptcy Notice).
20	NOTICE of Sureties.
21	AFFIDAVIT of Justification.
22	CERTIFICATE of Judge for Transfer of Proceedings.
23	ORDER for Transfer of Proceedings.
24	ADJOURNMENT of Petition.
25	DISMISSAL of Petition.
26	DISMISSAL of Petition upon which Proceedings are stayed, where a Receiving Order has been made on a subsequent Petition.
27	RESTRAINING Action, &c., before Receiving Order.
28	RECEIVING Order on Debtor's Petition.
29	RECEIVING Order on Creditor's Petition.
30	NOTICE of Receiving Order, &c. (Local Paper).
31	ORDER for Administration in Bankruptcy of Estate of deceased Debtor.
32	„ „ „ on Transfer of Proceedings under Sec. 125 (4.)
33	APPLICATION for Summary Administration under Sec. 121.

No. of Form.	
34	ORDER for Summary Administration.
35	STATEMENT of Affairs.
	(A) Unsecured Creditors.
	(B) Creditors fully secured.
	(C) Creditors partly secured.
	(D) Liabilities.
	(E) Preferential Creditors, for Rent, Rates, Taxes and Wages.
	(F) Liabilities of Debtor on Bills other than his own acceptances.
	(G) Property.
	(H) Debts due to the Estate.
	(J) Bills of Exchange, Promissory Notes, &c., available as assets.
	(K) Deficiency Account.
36	MEMORANDUM of Public Examination of Debtor.
37	ORDER of Court that Examination is concluded.
38	ORDER of Adjudication.
39	NOTICE of Adjudication (Local Paper).
40	APPLICATION to annul Adjudication under Sec. 35.
41	ORDER annulling Adjudication under Sec. 35.
42	APPLICATION for Order of Discharge.
43	CERTIFICATE of Number of Creditors.
44	NOTICE to Creditors of Application for Discharge.
45	ORDER of Discharge.
46	CERTIFICATE of Removal of Disqualification.
47	ORDER sanctioning Composition or Scheme.
48	APPLICATION for enforcement of Provisions in a Composition.
49	AFFIDAVIT in support of Application for enforcement of Provisions of a Composition under Sec. 18 or 23.
50	ORDER for Enforcement of Provisions in a Composition.
51	CERTIFICATE of Scheme or Composition.
52	AFFIDAVIT of Proof of Debt with or without Security.
52A	,, ,, ,, ,, ,, by Clerk.
53	AFFIDAVIT of Proof of Debt by Agent of Company.
54	GENERAL Proxy.
55	SPECIAL Proxy.
56	VOTING Letter under Sec. 18 (2).
57	NOTICE to Creditors of First Meeting.
58	NOTICE to Debtor to attend First Meeting of Creditors.
59	MINUTES of Proceedings at First Meeting. Bankruptcy.
59A	,, ,, ,, ,, Composition or Scheme.
60	LIST of Creditors assembled, to be used at every Meeting.
60A	LIST of Creditors assembled, to be used at every Meeting. Continuation Sheet.
61	ORDER of Court for General Meeting of Creditors.
62	NOTICE of Meeting (General Form).

No. of Form.	
63	NOTICE convening Second Meeting to confirm Composition or Scheme.
64	RESOLUTION at Second General Meeting.
65	NOTICE to Creditors and Official Receiver of Application to Court to sanction Composition or Scheme.
66	NOTICE to Creditors of Meeting to Remove Trustee and to appoint a person to fill the Vacancy.
67	NOTICE of Meeting to be held to appoint new Trustee.
68	MINUTES of Meeting for receiving Resignation of Trustee, &c.
69	REPORT of Appointment of Trustee.
70	REQUEST by Creditors to Board of Trade to notify Objection to Trustee to High Court.
71	CERTIFICATE of Appointment of Trustee.
72	BOND of Trustee.
73	REPORT of Appointment of Trustee to fill a Vacancy caused by Resignation, &c.
74	APPLICATION for Directions by Trustee.
75	ORDER on Application of Trustee for Directions.
76	NOTICE of Intention to disclaim Lease.
77	NOTICE of Intention to declare Dividend.
78	NOTICE of Intention to declare final Dividend.
79	STATEMENT to accompany Notice of Dividend.
80	NOTICE of Dividend.
81	APPLICATION by Creditor for Order for Trustee to pay Dividend withheld and Order thereon.
82	CERTIFICATE by Committee of Inspection as to Audit of Trustee's Accounts.
83	AFFIDAVIT verifying Trustee's Account.
85	TRUSTEE'S Trading Account.
86	PROFIT and Loss Account (Trading Account).
87	AFFIDAVIT verifying Trustee's Trading Account.
88	NOTICE to Bankrupt under Sec. 53.
89	ORDER setting aside Pay, Salary, &c., under Sec. 53 (1).
90	ORDER setting aside Salary or Income, &c., under Sec. 53 (2).
91	APPLICATION to Board of Trade to authorise Account at Local Bank.
92	ORDER of Board for Local Account.
93	NOTICE to Creditors of Intention to apply for Release.
94	APPLICATION by Trustee to Board of Trade for Release.
95	REQUEST to deliver Bill for Taxation.
96	ALLOCATUR.
97	FORM of Book to be kept by Taxing Officer.
98	RETURN by Taxing Officer.
99	ADMISSION of Debt by Debtor of Bankrupt.
100	ORDER to pay admitted Debt.
101	SEARCH Warrant.
102	WARRANT of Seizure.
103	WARRANT against Debtor about to quit England, &c.
104	SUBPŒNA ad Test. (High Court).

No. of Form.	
105	SUBPŒNA Duces Tecum (High Court).
106	SUBPŒNA or Summons to Witness in County Court.
107	SUMMONS under Sec. 27.
108	APPLICATION by Trustee for Committal of Bankrupt or other Person.
109	AFFIDAVIT in support of Application for Committal of Debtor for Contempt under Sec. 24.
110	AFFIDAVIT of Trustee under Sec. 50 (6).
111	NOTICE of Application for Committal under Secs. 18, 23.
112	ORDER of Committal under Sec. 18 or 23.
113	NOTICE of Application for Committal under Sec. 24.
114	AFFIDAVIT of Person interested in a Composition for Committal.
115	AFFIDAVIT for Immediate Committal under Sec. 102 (6).
116	NOTICE of Application for Committal under Sec. 50 (6).
117	ORDER of Committal under Sec. 24.
118	ORDER of Committal under Sec. 50 (6).
119	WARRANT of Committal for Contempt.
120	WARRANT to apprehend a Person summoned under Sec. 24.
121	ORDER for Discharge from Custody on Contempt.
122	ORDER to Postmaster-General under Sec. 26.
123	CERTIFICATE to Speaker of the House of Commons under Sec. 33.
124	ISSUES of Fact for Trial by Jury (High Court).
129	JUDGMENT Summons on Judgment or Order.
129A	JUDGMENT Summons on Judgment or Order for payment by instalments.
130	APPLICATION for Judgment Summons.
130A	APPLICATION for Judgment Summons for non-payment of Instalments.
131	AFFIDAVIT where Judgment Summons is sought on an Order of Court, not a County Court.
132	ORDER on Judgment Summons altering Original Order or Judgment.
133	ORDER of Commitment on an Order or Judgment of a Court other than a County Court.

ADMINISTRATION ORDERS.—SECTION 122.

Number.	
1	REQUEST for an Order of Administration.
2	NOTICE to Debtor.
3	,, Creditors (of Proceeding).
4	ORDER of Administration.
5	NOTICE to Creditors (of Order).
6	WARRANT of Execution.
7	JUDGMENT Summons.
8	ORDER of Commitment.
9	NOTICE to Debtor of Creditor's Claims.
10	NOTICE to Creditor that his claim is not objected to.
11	SUPERSEDING Order of Administration.
12	NOTICES of Orders of Administration.

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Spoiled Stamps accompanied with the requisite Affidavits (forms for which are supplied by Waterlow and Sons Limited) deposited at the Cancel Office, and the amount realised placed to credit of Customer, or if remitted in cash a small amount for Commission is deducted.

LAW STATIONERY AND FORMS
OF EVERY DESCRIPTION.

General Catalogue or Catalogue of Law Forms on Application.